

Vol. 1

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 312

THE UNITED STATES, PETITIONER

vs.

WILLOW RIVER POWER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 1, 1944
CERTIORARI GRANTED OCTOBER 9, 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 312

THE UNITED STATES, PETITIONER,

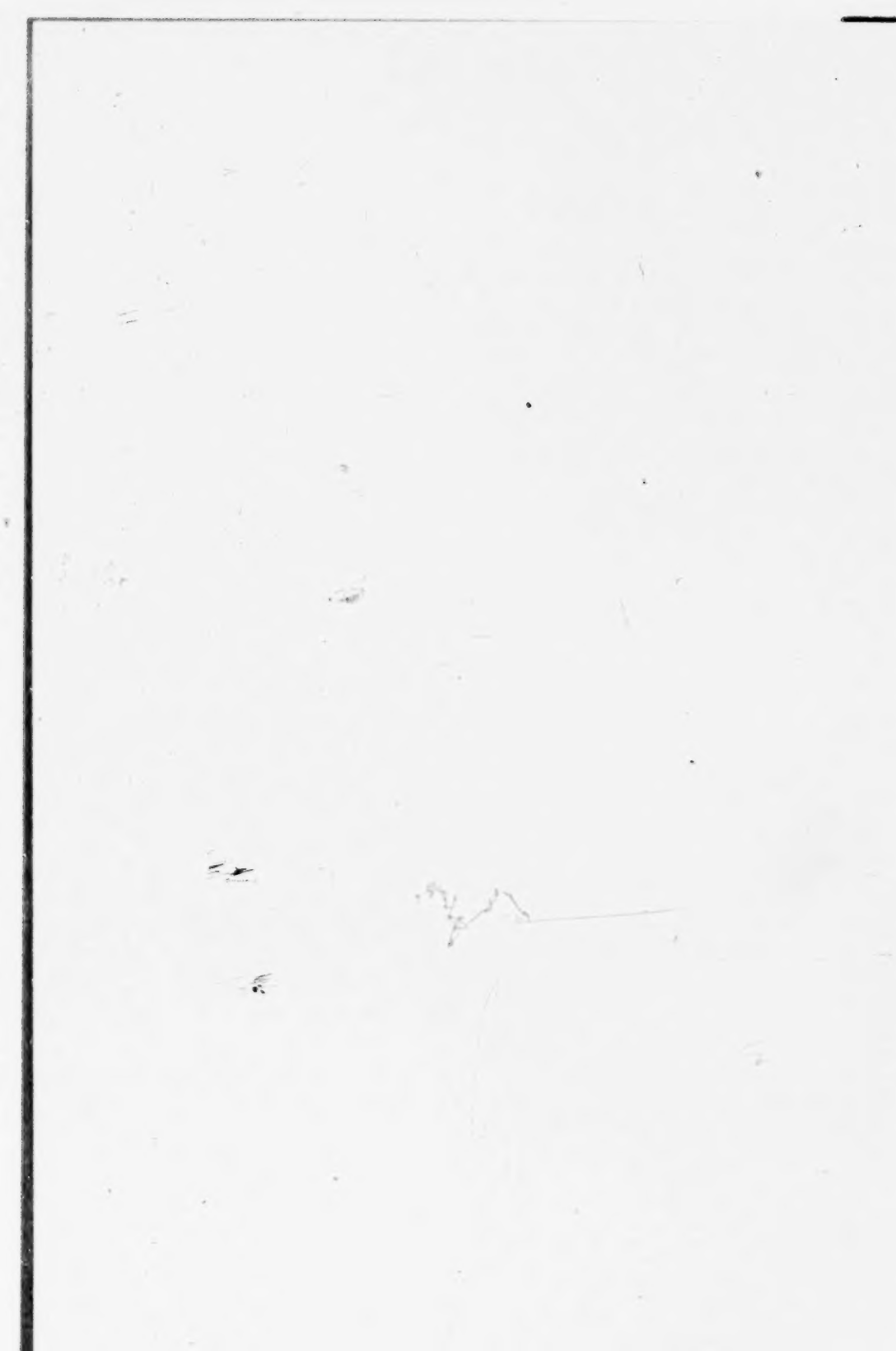
vs.

WILLOW RIVER POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
CLAIMS

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In Court of Claims

No. 45067

WILLOW RIVER POWER COMPANY, A WISCONSIN CORPORATION,
PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed Feb. 6, 1940

The plaintiff herein by R. M. Rieser, its attorney, by this petition for cause of action shows to the court and alleges as follows:

1. The plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of Wisconsin and as such is authorized and empowered by its charter to engage in the generation, distribution and sale of electric energy and power as a public utility under the Wisconsin Statutes, and is engaged as such with its principal place of business at Hudson, Wisconsin and serves numerous customers and municipalities in St. Croix County, Wisconsin and adjacent territory.

2. That pursuant to various acts of Congress and supplementary legislation of Congress, particularly the act approved January 21,

1927 (44 Statutes 1010), and acts amendatory thereof and supplementary thereto, the Government of the United States through its agencies has authorized and has undertaken to and did construct various dams, levees, control works, and other improvements in the Mississippi River in the area thereof between the confluence of the Wisconsin and Mississippi Rivers and the City of St. Paul, Minnesota, among which were dams across the Mississippi River at Alma, Wisconsin, known and described by the Government and its agencies as Dam and Lock #4, and also as the Alma Dam, which will be the designation of said dam hereinafter in these pleadings, and one located upstream from Red Wing, Minnesota, and upstream from said Alma dam and known and described by the Government and its agencies as Dam and Lock #3, or Red Wing Dam, which latter designation will for convenience be used to designate said dam hereinafter. Upstream from the Red Wing Dam and near the village of Prescott, Wisconsin, is the confluence of the Mississippi and St. Croix Rivers, both of which are navigable streams of the United States. The St. Croix River is a boundary stream between the states of

Minnesota and Wisconsin and rises in the northwesterly part of Wisconsin, flowing southerly past the cities of Stillwater, Minnesota, and Hudson, Wisconsin, until it joins the Mississippi River at Prescott. That the general course of the streams herein described and referred to, and the relation of the points thereon as referred to in this petition, appear on a plat attached hereto as Exhibit A, and by this reference are made a part hereof. As a result of construction of said dams at Alma and Red Wing, the water in the St. Croix River has been backed up and caused to raise in the St. Croix River to a maximum of nine (9) feet above the normal low water level of said stream, and thereby the Gov-

ernment of the United States took, appropriated to itself, and damaged lands, improvements, and developments along the St. Croix River within the areas flooded by and damaged by such nine (9) foot rise in water, and especially the improvements and property of the plaintiff herein as more particularly described hereinafter. The government of the United States now uses and employs part of the dam of the plaintiff as a dyke and as a means of limiting the spread of the back water created by the construction of such dams and thereby causes damage to the dam of the plaintiff, both by reducing its effectiveness and usefulness and by causing said dam to deteriorate more rapidly from the effect of wave action, stream action, and ice.

3 The Willow River, a nonnavigable stream of the United States, rises in Northwestern Wisconsin and empties into the St. Croix River at the City of Hudson, Wisconsin. (See Exhibit A attached hereto.)

4 Along the course of the Willow River, the plaintiff has developed several integrated and synchronized water power sites by construction of dams at such sites, one of which is located near the point where the Willow River discharges into the St. Croix River, on property described as follows:

"Sections 23 and 24 Township 29 North, Range 20 west and Sections 13, 18, and 19 Township 29 North Range 20 West in St. Croix County, Wisconsin."

5 At low water stages of the St. Croix River this dam, prior to the building of the dams at Alma and Red Wing, had an effective operating head of 22.5 feet. As a result of the construction of the aforesaid dams, and the raising of the water in the St. Croix river as described herein, this head has been reduced to 13½ feet. This reduction in operating head has resulted in the reduction of generating capacity of said dam of about 220 H. P.

4 and 150 Kilowatts. The taking, appropriating, and damaging aforesaid was the direct, natural, proximate, and

necessary result of the erection of said dams and the general result contemplated, anticipated, and predicted by the Government engineers prior to the erection of the dam, as fully appears from Government reports, particularly Documents #290, 71st Congress, 2nd session, and Document #137, 72nd Congress, 1st Session, and other reports and records not now available, but which as plaintiff is informed and believes, are in control of the respondent and which plaintiff has attempted to obtain, but without success. In order to obtain the benefits of such dams, it was necessary to take, appropriate, and damage the property of the plaintiff, and such taking, appropriating, and damaging to the property of the plaintiff has resulted in material benefit to the vast and extensive undertaking of the Government and the use of the property of the plaintiff so taken, appropriated, and damaged is necessary to the full realization by the defendant of the benefits to be obtained from such dams. The said taking, appropriating, and damaging of the plaintiff's property has so reduced its generating capacity as to require the investment of large additional sums in supplying energy lost at continued extra cost to the plaintiff and has destroyed the efficiency and effectiveness of its generating facilities aforesaid to the damage to the plaintiff in the sum of \$125,000.00, and the plaintiff is justly entitled to recover the amount claimed after allowing all just credits and offsets.

6. That no action on the claim aforesaid has been taken by Congress or by any department of the Government so far as plaintiff is informed, except that pursuant to a resolution adopted

March 16, 1939 by the Committee on Rivers and Harbors of the House of Representatives of the Congress of the United States, the Board of Engineers for Rivers and Harbors was requested to review reports of said Board in House Document #137, 72nd Congress, first session; that said Board through authorized representatives did conduct investigations and this plaintiff filed, at a hearing at Stockholm, Wisconsin, on July 12, 1939, notice and general description of its claim.

7. That the plaintiff is now and at all times has been the lawful owner of the aforesaid claim and said claim has never been assigned or transferred in whole or in part.

8. That the plaintiff has at all times shown true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

As and for a second and further cause of action, the plaintiff above named alleges as follows:

1. The plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of Wisconsin, and as

such is authorized and empowered by its charter to engage in the generation, distribution, and sale of electric energy and power as a public utility under the Wisconsin Statutes, and is engaged as such with its principal place of business at Hudson, Wisconsin, and serves numerous customers and municipalities in St. Croix County, Wisconsin, and adjacent territory.

2. That pursuant to various acts of Congress and supplementary legislation of Congress, particularly the act approved January 21, 1927 (44 Statutes 1010), and acts amendatory thereof and supplementary thereto, the Government of the United States through its agencies has authorized and has undertaken to and did construct

6 various dams, levies, control works, and other improvements in the Mississippi River in the area thereof between the confluence of the Wisconsin and Mississippi Rivers and the City of St. Paul, Minnesota, among which were dams across the Mississippi River at Alma, Wisconsin, known and described by the Government and its agencies as Dam and Lock #4, and also as the Alma Dam, which will be the designation of said dam hereinafter in these pleadings, and one located upstream from Red Wing, Minnesota, and upstream from said Alma dam and known and described by the Government and its agencies as Dam and Lock #3, or Red Wing Dam, which latter designation will for convenience be used to designate said dam hereinafter. Upstream from the Red Wing Dam and near the village of Prescott, Wisconsin, is the confluence of the Mississippi and St. Croix Rivers, both of which are navigable streams of the United States. The St. Croix River is a boundary stream between the states of Minnesota and Wisconsin, and rises in the northwesterly part of Wisconsin, flowing southerly past the cities of Stillwater, Minnesota, and Hudson, Wisconsin, until it joins the Mississippi River at Prescott. That the general course of the streams herein described and referred to, and the relation of the points thereon as referred to in this petition, appear on a plat attached hereto as Exhibit A, and by this reference are made a part hereof. As a result of construction of said dams at Alma and Red Wing, the water in the St. Croix River has been backed up and caused to raise in the St. Croix River to a maximum of nine (9) feet above the normal low water level of said stream, and thereby the Government of the United States took, appropriated to itself, and damaged lands, improvements, and developments along the St. Croix River within the areas flooded by and damaged by such nine (9) foot rise in water, and especially the property of the plaintiff as herein-
7 after more particularly described. The Government of the United States now uses and employs part of the property of the plaintiff by flooding the same and thereby has destroyed the

use and value of the property of the plaintiff in the manner herein more specifically described.

3. The Apple River, a nonnavigable stream of the United States rises in northwestern Wisconsin and empties into the St. Croix River north of the City of Hudson, Wisconsin, and somewhat below the City of Stillwater, Minnesota. (See Exhibit A attached hereto.)

4. Near the mouth of the Apple River is a water power site owned by the plaintiff, at which the water of the Apple River prior to the construction of the dams described above fell very rapidly to a level nearly that of the normal level of the St. Croix River and said site prior to the construction of said dams was a valuable site for the erection of an efficient and useful dam so located with reference to other developments of the plaintiff as described in the first cause of action hereof, to which reference is made, as to be readily integrated with such operation and as to be economically and efficiently operated in connection with such operations; that said site was located upon real estate described as follows:

"Sections 21 and 28 of Township 31, North Range 19 West in St. Croix County, Wisconsin."

5. At low water stages of the St. Croix River, it was possible to develop this site into an effective and useful dam. As a result of the construction of the aforesaid dams, and the raising of the water in the St. Croix River as described herein, the possible head of this dam has been almost entirely destroyed, and its usefulness and ef-

fectiveness has been destroyed to a point where it is no longer

8 ~~it~~ possible to develop the site economically or operate any dam at the site profitably, and the value of the plaintiff's property

has therefore been entirely destroyed, except for the value of the land as agricultural lands which is nominal as plaintiff is informed and believes. The taking, appropriating, and damaging aforesaid was the direct, natural, proximate, and necessary result of the erection of said dams and the general result contemplated, anticipated, and predicted by the Government Engineers prior to the erection of the dam as fully appears from Government reports, particularly Document #290, 71st Congress, 2nd session, and Document #137, 72nd Congress, 1st session, and other reports and records, not now available, but which as plaintiff is informed and believes are in control of the respondents and which plaintiff has attempted to obtain but without success. In order to obtain the benefits of such dams it was necessary to take, appropriate, and damage the property of the plaintiff, and such taking, appropriating and damaging to the property of the plaintiff has resulted in material benefit to the vast and extensive undertaking of the Government and the use of the property of the plaintiff so taken, appropriated, and dam-

aged is necessary to the full realization by the defendant of the benefits to be derived from such dams. The said taking, appropriating, and damaging of the plaintiff's property has entirely destroyed the value of the property aforesaid and part of the property so taken, appropriated, and destroyed is actually used by and beneficial to the Government as hereinabove alleged, all to the damage of the plaintiff in the sum of \$15,000.00, and the plaintiff is justly entitled to recover the amount claimed after allowing all just credits and offsets.

6. That no action on the claim aforesaid has been taken by Congress or by any department of the Government so far as plaintiff is informed, except that pursuant to a resolution adopted March 16, 1939, by the Committee on Rivers and Harbors of the House of Representatives of the Congress of the United States, the Board of Engineers for Rivers and Harbors was requested to review reports of said Board in House Document #137, 72nd Congress, first session; that said Board through authorized representatives did conduct investigations and this plaintiff filed, at a hearing at Stockholm, Wisconsin, on July 12, 1939, notice and general description of its claim.

7. That the plaintiff is now and at all times has been the lawful owner of the aforesaid claim and said claim has never been assigned or transferred in whole or in part.

8. That the plaintiff has at all times shown true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

Wherefore the plaintiff demands judgment against the defendant in the sum of \$125,000.00 on the first cause of action herein and in the amount of \$15,000.00 on the second cause of action herein and for its costs and disbursements.

R. M. RIESER,

Attorney for the Plaintiff.

JOHN WATTAWA,

LYNN ASHLEY,

Of Counsel.

[*Duly sworn to by A. R. Shultz; jurat omitted in printing.*]

10 *Proceedings relative to defendant's special answer and plea in bar*

On March 18, 1940, the defendant filed a general traverse.

On October 2, 1941, the defendant filed a motion for leave to withdraw its general traverse and to file a special answer and plea in bar.



On October 14, 1941, said motion was allowed and defendant's special answer and plea in bar was filed, which is as follows:

11 *Defendant's special answer and plea in bar*

Filed Oct. 15, 1941

The defendant, answering the averments of the petition filed in the above-entitled cause, shows unto the Court:

FIRST CAUSE OF ACTION

1. It admits the allegations of Paragraph 1 of the petition.

2. It admits that, pursuant to the Act of Congress approved January 21, 1927 (44 Stat. 1010) and Acts amendatory thereof and supplementary thereto, the United States constructed various dams, levees, control works, and other improvements in the Mississippi River in the area thereof between the confluence of the Wisconsin and the Mississippi Rivers and the city of St. Paul, Minnesota, among which were dams across the Mississippi River at Alma, Wisconsin, known and described as Lock and Dam No.

4 and another located upstream from Red Wing, Minnesota,
12 known and described as Lock and Dam No. 3; that upstream from Lock and Dam No. 3 and near the village of Prescott, Wisconsin, is the confluence of the Mississippi and the St. Croix Rivers, both of which are navigable streams of the United States; and that the St. Croix River is a boundary stream between the states of Minnesota and Wisconsin, and rises in the northwesterly part of Wisconsin, flowing southerly past the cities of Stillwater, Minnesota and Hudson, Wisconsin, until it joins the Mississippi River at Prescott; but defendant denies that, as a result of the construction of said locks and dams, the water in the St. Croix River has been backed up and caused to raise in said river to a maximum of 9 feet above the normal low water level of said stream. Defendant further denies that the Government of the United States took, appropriated, and damaged any lands, improvements, and developments along the St. Croix River owned by plaintiff as a result of the construction of said locks and dams, and denies that the United States now uses and employs any part of the dam of plaintiff as a dyke and as a means of limiting the spread of back water created by the construction of such locks and dams, and further denies causing damage to plaintiff's dam either by reducing its effectiveness and usefulness or by causing it to deteriorate more rapidly from the effect, of wave action, stream action, and ice.

Further answering, defendant states and shows unto the
13 Court that the downstream end of the St. Croix River, between Stillwater and Prescott on the Mississippi River, a distance of 24 miles, is widened considerably, and is sometimes referred to as Lake St. Croix; that the lake portion of the river has a slope or fall of less than one foot in 24 miles whereas throughout the distance of 140 miles above Stillwater the river has an average slope of 2.4 feet per mile; that the city of Hudson is located on the eastern shore of Lake St. Croix, 16 miles above its confluence with the Mississippi River.

Further answering, defendant states and shows unto the Court that the water level of Lake St. Croix is variable and seasonal, the fluctuations depending upon the annual precipitation throughout the watershed of that river, the time and rapidity of spring thaws, the amount of annual snow and rainfall, and the existing stage of water in the Mississippi River. That in the spring and early summer months the water level of said lake has varied generally between elevations 670 feet above mean sea level and 680 feet m. s. l. with occasional falls below and rises above said elevations.

Further answering, defendant states that Alma, Wisconsin, is approximately 75 miles below or downstream from the city of Hudson, Wisconsin; that Dam No. 4, constructed at Alma, was built to a crest elevation of 667 feet in m. s. l.; that said dam, completed on June 26, 1935, was provided with movable roller gates, capable of being opened and closed at will, and thus permitting

a regularization and stabilization of the water level in the
14 pool above; that the effect of said dam, with gates closed, is to raise the water in the pool above to elevation 667'; that the mouth of the St. Croix River is approximately 59 miles upstream from Lock and Dam No. 4; that the maintenance and operation of said dam had but a negligible effect on the elevation of the water level in Lake St. Croix upstream as far as the city of Hudson; that since the completion in 1938 of Government Dam No. 3, 45 miles upstream from Dam No. 4, the pool above the last named dam has had no effect upon the water level of Lake St. Croix; that at no time has the water level in Lake St. Croix at the city of Hudson been increased above the ordinary high water mark of 676 feet m. s. l. opposite that city, as a direct consequence of the maintenance and operation of said Dam No. 4.

That Lock and Dam No. 3, located in the Mississippi River, approximately 30 miles downstream from the city of Hudson and 45 miles upstream from Dam No. 4, was completed on March 30, 1938, and full pool was attained on August 12, 1938. Dam No. 3 was constructed with a crest elevation of 675 feet m. s. l. which produced a normal pool level above it of the same elevation. The

dam is provided with movable roller gates, and, as the flow in the river increases, the level of the pool immediately above the dam is lowered by opening the gates clear of the water, thereby producing open river conditions and thus the normal pool elevation is maintained. If higher elevations occur beyond the
15 normal pool elevation, such elevations arise from natural conditions and are not caused by or due to the maintenance and operation of Lock and Dam No. 3. The object, purpose, and normal effect of maintaining and operating Dam No. 3 with its gates closed is, among other things, to maintain and stabilize the water surface in Lake St. Croix, at the mouth of Willow River hereinafter referred to, and at the city of Hudson, at an elevation of approximately 675 feet m. s. l. or at approximately 1 foot below the ordinary high water mark at that location. That the object and purpose of canalizing the river by constructing said Government dams were to improve the navigable capacity of the upper Mississippi River, Lake St. Croix and other navigable waterways tributary to the Mississippi River as more particularly shown by House Department 462, 71st Cong., 2nd Sess., which is made a part of this pleading by reference.

3. Defendant admits so much of Paragraph 3 of the petition as alleges that Willow River rises in northwestern Wisconsin and empties into the St. Croix River at the city of Hudson, but defendant denies that Willow River is a nonnavigable stream of the United States. Further answering, and by way of affirmative allegation, defendant shows unto the Court that Willow River is a navigable stream of the United States and that, prior to the construction by plaintiff of a dam across the mouth of said
16 river, thereby blocking ingress thereto and egress therefrom, as more particularly referred to hereinafter, was capable of floating water-borne commerce of an interstate character, and was used for the flotation and transportation of boats and other valuable property thereon. That by a decision of the highest court of the state of Wisconsin, handed down in 1898 in a cause entitled Willow River Club v. Wade, reported in Volume 106 of the Wisconsin Reports, at page 86, Willow River was found as a matter of fact and determined as a matter of law to be "a public navigable stream, fitted for useful commerce and transportation of persons and property thereon."

4. Defendant admits that along the course of the Willow River the plaintiff has developed several integrated and synchronized water power sites by construction of dams at such sites, one of which is located near the point where the Willow River discharges into the St. Croix River upon property more particularly described in Paragraph 4 of the petition.

Further answering, the defendant states and shows unto the Court that the dam so constructed by the plaintiff near the point where the Willow River discharges into the St. Croix River (or Lake St. Croix) was constructed upon a concrete foundation extending across or occupying the full width of the mouth of a navigable stream, and said foundation now rests upon the bed of said stream below the ordinary high water elevation thereof; that by such construction and the erection of tainter gates thereon and thereover, the water of Willow River has been dammed and caused to be artificially held back, so that its elevation since the erection of said foundation and tainter gates is approximately 22 feet above its natural elevation, in consequence of which commerce and navigation between points on the Mississippi River, by way of Lake St. Croix, and points on Willow River can no longer be carried on because of the obstruction to navigation said dam interposes, and as a further consequence the Mississippi River, of which Willow River is tributary-feeder, has been deprived of the free, natural, and unimpeded flow of water from said Willow River.

The defendant further shows unto the Court that the provisions of an Act approved March 3, 1899 (30 Stat. 1151; Tit. 33 U. S. C. Secs. 401, 403), and other enactments prohibit and make it unlawful, without first obtaining the consent of Congress and approval by the Chief of Engineers, to construct or maintain a dam or other structure within a navigable river which obstructs or impedes navigation or otherwise impairs the navigable capacity of such waterway. Defendant further shows unto the Court that plaintiff's said dam at the mouth of Willow River was erected after the passage of said Act of Congress and was reconstructed during 1934-1935 following its destruction by a flood in the year 1934; that plaintiff did not obtain the consent of Congress and the approval of the Chief of Engineers for such construction and reconstruction. Nor did plaintiff obtain a license or permit from the Federal Power Commission, as required by law, to generate electric energy at and by means of a reconstructed and new dam located within the bed of a navigable waterway of the United States.

5. Defendant denies that by reason of the construction by the Government of locks and dams numbered 3 and 4 at Alma and Red Wing, respectively, the head of water in the St. Croix River at the location of plaintiff's said dam and hydroelectric power plant at the mouth of the Willow River has been reduced from 22.5 feet to 13.5 feet as alleged in Paragraph 5 of the petition. Defendant further denies that reduction of the operating head has resulted in reducing the generating capacity of said dam as

much as 220 H. P. and 150 kilowatts, and further denies that it has taken or appropriated any property or property right of plaintiff superior to the dominant right of the United States without liability to raise permanently the level of a navigable waterway to any elevation below the ordinary high water level for the purpose of aiding navigation; and defendant further denies that in so raising the water level of the St. Croix River (or Lake St. Croix) a benefit resulted inuring to the United States and denies further that plaintiff has been damaged in the sum of \$125,000.

19 Defendant admits that the water level of the St. Croix River is raised $5\frac{1}{2}$ ft. above normal low water when the movable gates of Dam No. 3 at Red Wing are fully closed, and further admits there is some decrease in power resulting from such raising of the water level, but defendant alleges that such decrease in power is slight and of conjectural value.

Further answering, the defendant alleges and shows unto the Court that during floods and stages of water exceeding the normal pool level, the gates of the dam are raised clear of the water so as to permit the free and unobstructed flow of the river, in consequence of which the water level in Lake St. Croix is not raised above what it normally would be raised by flood water coming down the St. Croix River from above or by flood water from the Mississippi River backing into Lake St. Croix. Further answering, defendant shows unto the Court that whatever damages the plaintiff has suffered or will hereafter suffer by reason of the construction of Government Dams numbered 3 and 4 are problematical, conjectural, indirect, and inconsequential, and not recoverable against the United States in this Court within the jurisdiction granted to it by Congress.

6. Defendant admits the allegations of Paragraphs 6, 7, and 8 of the first cause of action.

7. By way of further answer, defendant shows unto the Court that no fast land, the ownership of which is claimed by plaintiff, has been flooded or invaded as a consequence of the construction of the Government dams aforementioned; that plaintiff
20 has not been ousted from the use and enjoyment of either the fast land or the hydroelectric power house constructed at the confluence of Lake St. Croix and Willow River; and that since the construction of the Government dams, electric energy has been produced at said hydroelectric power house and in equivalent amounts the same as before the operation of the Government dams.

SECOND CAUSE OF ACTION

1. Defendant admits the averments of Paragraph 1 of plaintiff's second cause of action.

2. Defendant here repeats the admissions and denials set forth in its answer to the averments of Paragraph 2 of the first cause of action, insofar as they are responsive, pertinent, and material to the averments of Paragraph 2 of the second cause of action.

Further answering, defendant denies that the Government of the United States now uses and employs a part of the property of plaintiff located on Appie River by flooding the same, and denies that it has destroyed the use and value of the property of plaintiff so located.

Further answering, and by way of affirmative averment, defendant shows unto the Court that the alleged-dam site, riparian to Apple River, topographically is situated at a ground elevation high above the probable reach of any backwater that normally might or could result from the construction of dams numbered 3 and 4 in the Mississippi River, and by reason of which fact, among others, said site as a potential and suitable location for a future dam for the generation of hydroelectric power has not been taken, appropriated, physically damaged, reduced in value, or otherwise affected as a consequence of the construction by the United States of locks and dams numbered 3 and 4.

3. Defendant admits that Apple River is a nonnavigable stream emptying into the St. Croix River north of the city of Hudson, Wisconsin, but denies that the point of entrance into the St. Croix River is below the city of Stillwater, Minnesota.

4. Defendant has no knowledge respecting the title and present legal ownership of the land described in paragraph 4 of the second cause of action as being located near the mouth of Apple River, and has no facts or other information from which it can form a belief or express an opinion concerning the same; but for the purposes of this plea only, and for the determination and judicial settlement of the jurisdictional questions and other issues of law raised by the facts alleged and affirmatively pleaded in bar herein, defendant admits plaintiff's ownership and possession of land as more particularly described in Paragraph 4 of the second cause of action; but defendant denies all remaining material averments of said Paragraph 4.

5. Defendant denies generally the averments of Paragraph 5 of the second cause of action, and denies particularly that defendant has taken, appropriated, used, rendered valueless or profitless, or otherwise damaged any fast or upland of plaintiff's as a consequence of the construction of said Government dams numbered 3 and 4, and denies that plaintiff has been damaged in the sum of \$15,000, or in any other amount.

6. Defendant admits the averments of Paragraphs 6, 7, and 8 of the second cause of action.

Wherefore: The plaintiff, having failed to state a legal cause of action, within the jurisdiction of this Court, upon either the first or second counts or causes of action, and upon the further facts alleged affirmatively herein by defendant in bar, defendant prays that the petition be dismissed.

FRANCIS M. SHEX,

Assistant Attorney General.

P. M. Cox,

Attorney.

23 *Plaintiff's reply to defendant's special answer and
plea in bar*

Filed Nov. 10, 1941

The plaintiff in reply to the averments of defendant's special answer and plea in bar filed in the above entitled cause shows unto the court as follows:

AS TO THE FIRST CAUSE OF ACTION

1. With reference to the allegations in the paragraph beginning at the bottom of page 13 of defendant's special answer plaintiff admits the same and also admits that there are variable seasonal fluctuations depending upon precipitation throughout the watershed of the St. Croix River which affect and have affected from time to time the level of Lake St. Croix but denies that the level has generally varied between elevations of 670 feet above mean sea level and 680 feet above mean sea level, and alleges that in truth
24 and in fact the ordinary highwater level of Lake St. Croix has been and prior to August 1938 was substantially 671 feet above mean sea level.

2. In further reply to said answer, plaintiff admits the allegations of the paragraph beginning near the bottom of page 13 and continuing on page 14, except that plaintiff denies the allegation that at no time has the water level in Lake St. Croix at the city of Hudson been increased above the high water mark of 676 feet above mean sea level opposite that city as a direct consequence of the maintenance and operation of Dam 4, being the Red Wing Dam.

3. Admits the allegations of the paragraph beginning on page 14 of said answer but as to the allegation as to the effect of the movable roller gates and their effect upon the pool elevation, plain-

tiff has no information sufficient whereon to base a belief and therefore puts the defendant to its proof as to the same.

4. As to the affirmative allegation in paragraph No. 3 beginning on the bottom of page 15, the plaintiff denies the same except to admit that a decision in an action entitled as therein alleged, to which the plaintiff herein was not a party, was rendered as therein alleged and alleges that said decision is not binding on the plaintiff for the reason that the plaintiff was not a party thereto and moreover that said decision is founded upon the Wisconsin test of navigability usually referred to as the "floatability" test which is not based upon commercial navigation and tests and determines navigability on entirely different considerations than does the federal test of navigability and the power of the federal government to claim jurisdiction over navigable waters
25 under the commerce clause of the Constitution of the United States.

5. Further answering said paragraph 3, plaintiff alleges that since 1864 the legislature of Wisconsin by numerous acts enacted by it has recognized the Willow River as nonnavigable for commercial purposes within the test of the Wisconsin law in that it has authorized the erection of dams and obstructions to said river and fixed rights of persons erecting such dams by the regulations provided for under the Mill Dam Act of the state of Wisconsin, an act provided for the regulation of dams upon nonnavigable streams, that such legislation includes Chapter 302, Supplement to Private and Local Laws of 1864; Chapter 122, Private and Local Laws of Wisconsin of 1866; Chapter 366, Private and Local Laws of 1868; Chapter 361, Private and Local Laws of 1869; and Chapter 115, Private and Local Laws of 1872. During all of said time when each of the acts above enumerated were enacted the Mill Dam Act was contained in Chapter 56 of the Wisconsin Statutes and is now incorporated in Chapter 31, Wisconsin Statutes, and alleges that the act of 1864 and the acts of 1868, 1869, and 1870 above referred to specifically authorized and approved the dam described in plaintiff's petition.

6. Answering the second paragraph of paragraph No. 4 of the answer, and beginning at the bottom of page 16 and continuing on page 17 of the answer, plaintiff admits the place of discharge of the Willow River as alleged in said paragraph and admits that
the dam of the plaintiff was constructed across the full width,
26 of the Willow River near its mouth but denies that the river at said point or anywhere along its course is navigable. Plaintiff admits that the water of the Willow River has been dammed and caused to be artificially held back by said dam so that its elevation since the erection thereof is approximately 22

feet above normal elevation but denies that commerce and navigation to and from the Mississippi River to points of the Willow River can no longer be carried on for the reason that there was no such commerce and said Willow River is not and never was able to carry such commerce and the plaintiff denies that the dam of the plaintiff in any manner interferes with the free, natural, and unimpeded flow of the water from the Willow River, except as lawfully authorized by the customs and laws of the State of Wisconsin and the decisions of its courts.

7. With respect to the allegation beginning on the bottom of page 17 of said answer, plaintiff admits the passage of the act therein referred to and admits that no authority or approval was ever obtained from the United States or any of its officers or representatives for the erection of said dam and alleges that the reason therefor was that none was required. Plaintiff denies that the dam at the mouth of the Willow River was erected after the passage of the act of Congress and denies that the dam at the mouth of the Willow River was reconstructed in the year 1934 as alleged in said answer but alleges the fact to be that the dam at the mouth of the Willow River had been constructed and maintained many years prior to the passage of the act referred to. That to promote the

27 of said power site and said dam, the plaintiff herein and its predecessors in title long prior to the passage of the act approved March 3, 1899, referred to in said answer cut a channel through an embankment on the fast land upon its own property and upon the fast land along the St. Croix River so as to effect a new entrance for the water coming down the Willow River into the St. Croix River, and therein erected a dam and as part thereof installed the usual gates, water wheels, turbines, generators, etc. for the generation of power and thereafter discharged the water, impounded by the said dam previously erected across the Willow River, through such water wheels and turbines by means whereof it has generated power and operated its utility properties. That by the local customs and laws of the state of Wisconsin and the decisions of its courts the owner of property along both navigable and nonnavigable streams owns and possesses title to low water mark upon navigable streams and the entire bed of nonnavigable streams and such right is a valuable property right which cannot be taken from such owner for public use except for just and adequate compensation, by reason whereof the plaintiff herein has owned and now owns the property to the low water mark on the St. Croix River or approximately at elevation 666 feet above mean sea level and owns the entire bed of the Willow River at and near its mouth.

8. That prior to the erection of defendant's dam No. 3 the plaintiff herein was able to completely discharge the water from its dam without hindrance or interruption except during a very limited period of high water in the St. Croix River but since the
28 erection thereof the plaintiff's dam has been destroyed to the extent and in the manner set forth in the petition herein and, that in accordance with the local customs and the laws of the State of Wisconsin and the decisions of its courts, there has been and is a taking by the government of the United States for which the plaintiff herein is entitled to compensation from defendant.

9. With respect to the last paragraph of paragraph No. 5 of the Answer appearing on page 19 of said answer, plaintiff has no information sufficient whereon to base a belief and therefore puts defendant to its proof.

10. With respect to paragraph No. 7 of the answer appearing on pages 19-20 of said answer, plaintiff denies that no fast land, the ownership of which has been claimed by the plaintiff, has been invaded as a result of the construction by the defendant of the dams aforementioned and alleges that it has been ousted from the use and enjoyment of fast land and of hydroelectric power formerly produced and generated by said dam, and alleges that it has not been able to produce hydroelectric power in equivalent amounts at the times as before the operation of the government dams or at any time.

And the plaintiff shows to the court.

AS TO THE ANSWER TO THE SECOND CAUSE OF ACTION

1. Plaintiff admits, denies, qualifies, and explains the parts of the defendant's answer incorporated by reference in paragraph 2
29 in the manner and to the extent responsive, pertinent and material to the reply to this cause of action by incorporation and reference to the allegations in its reply to the answer to the first cause of action.

2. Plaintiff alleges that the dam site riparian to Apple River topographically is situated at a ground elevation so as to be reached by and is actually reached by and flooded out by the back water that normally backs upon such site by reason of the construction of dam No. 3 across said Mississippi River and that by reason of such fact such site as a potential and suitable site for a future dam for the generation of hydroelectric power has been taken, appropriated, physically damaged, reduced in value, and otherwise affected, all as a consequence of the construction by the United States of lock and dam No. 3 across the Mississippi River.

Wherefore, the plaintiff demands that the prayer of its petition be granted.

R. M. RIESER,
Attorney for Plaintiff.

LYNN ASHLEY,
Of Counsel.

[*Duly sworn to by A. R. Schultz; jurat omitted in printing*]

30 *Argument and submission of case*

On June 8, 1943, the case was argued and submitted on merits by Mr. R. M. Reiser for plaintiff, and by Mr. P. M. Cox for defendant.

31 *Special findings of fact, conclusion of law and opinion of the court by Whaley, Ch. J.*

Filed Feb. 7, 1944

Mr. R. R. Rieser for the plaintiff. Mr. John Wattawa and Rieser & Mathieys were on the briefs.

Mr. P. M. Cox, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special findings of fact

1. The plaintiff, Willow River Power Company, is a public utility company of the State of Wisconsin. During the times here involved it developed electric power hydraulically and by other means and sold it to the surrounding community. Its power plant was located near the confluence of the Willow River and the St. Croix River, in the city of Hudson, Wisconsin, on land owned by it above ordinary high water of the St. Croix River.

2. Willow River is a nonnavigable stream in the State of Wisconsin and enters the St. Croix River at Hudson. The St. Croix River is a navigable stream, in its lower reaches forming the boundary between Wisconsin and Minnesota. It enters the Mississippi River, also a navigable stream, at Prescott.

In times past logs were boomed down portions of the Willow River in time of spring freshets by means of dams and sluices. This industry has long since been abandoned. Dams erected for that special purpose were in course of time succeeded by dams erected for the single purpose of developing electric power hydraulically.

3. The plaintiff operates four such plants on the Willow River.

32 Beginning near the mouth of the river, at Hudson, is a plant which, before the cause of action here complained of, had a maximum head of $22\frac{1}{2}$ feet, known as the St. Croix plant, and is the plant here in controversy. It has two 150-kilowatt generators attached to vertically operated turbines.

The next one upstream is the Little Falls plant, with a maximum head of 22 feet and a unit of 300 kilowatts.

The third one in order is the Willow Falls plant, with a maximum head of 107 feet, with two 300-kilowatt generators.

The fourth one upstream is the Mounds plant, with a head of 50 feet and a 180-kilowatt generator.

These four plants form a system and are operated by plaintiff as such.

None of the dams has locks or sluiceways, and none is provided with passage for any form of vessel.

The dam at the St. Croix plant is the oldest of the dams and was erected in the latter part of the 19th century.

4. The St. Croix River enters the upper Mississippi at Prescott, and from Prescott to slightly beyond Stillwater on the St. Croix, upstream from the junction of the Willow River and the St. Croix River, the St. Croix is in the form of a greatly elongated lake.

Pursuant to Congressional authorization, defendant erected near Red Wing, Minnesota, a dam designated No. 3 and herein-after termed the "Red Wing Dam." The pool created above the dam had an ordinary height of 675 feet above mean sea level and extended up the Mississippi and to Stillwater on the St. Croix River, or beyond plaintiff's St. Croix plant.

The pool was created by the Red Wing Dam on August 12, 1938.

Where the water of Willow River empty into Lake St. Croix through the St. Croix plant, the ordinary level of Lake St. Croix after the erection of the Red Wing Dam was approximately 675.3 feet.

The Red Wing Dam may be operated in such manner that in times of flood the current may be allowed to flow as under natural conditions, except for a slight swell. It is located about 15 miles downstream from the junction of the St. Croix and Mississippi Rivers. Hudson is about 15 miles upstream on the St. Croix River from Prescott.

33 5. Before creation of the pool back of the Red Wing Dam the ordinary high-water level of Lake St. Croix at plaintiff's St. Croix plant was 672 feet mean sea level. The Red Wing pool did not affect the levels of Willow River, but it did raise the ordinary high-water mark of Lake St. Croix at plaintiff's St. Croix plant about 3 feet, raising the water level in the tailrace of plain-

tiff's plant by that amount, which decreased the head of plaintiff's dam by 3 feet. This diminished plaintiff's hydroelectric power at the St. Croix plant. The head above ordinary high water before the erection of the Red Wing Dam was 17 feet.

In order to make up this deficiency plaintiff entered into a contract with Northern States Power Company, October 10, 1938, whereby the Northern States Power Company agreed to supply electric current to the plaintiff "to the extent of Five Hundred (500) Kilowatts of Demand, for Customer's [plaintiff's] use for light, heat, and power, for public and private use in the communities and rural areas now served from Customer's transmission and distribution system," the energy thus supplied to be used as auxiliary to the plaintiff's own generating facilities. A copy of this contract is marked in evidence as plaintiff's exhibit "S" and is made a part hereof by reference.

This energy was to be delivered to plaintiff at the plant of the Northern States Power Company. In order to transmit it to plaintiff's plant it was necessary to build a transmission line, which was done at a cost of \$21,000.

6. The value of the loss in power as a result of the raising of the level of the St. Croix River by 3 feet above ordinary high water was \$25,000 at the time and place of taking.

7. The plaintiff abandons its claim with respect to destruction of site for a dam and possible waterpower head on the Apple River, and no findings in connection therewith are made.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is entitled to recover the sum of \$25,000, with interest at $4\frac{1}{2}$ percent per annum, from August 12, 1938, to the date of payment of judgment, not as interest but as a part of the just compensation.

34 It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-five thousand dollars (\$25,000), with an additional amount measured by interest at the rate of four and one-half ($4\frac{1}{2}$) percent per annum on twenty-five thousand dollars (\$25,000) from August 12, 1938, to the date of payment of the judgment, not as interest but as a part of the just compensation.

Opinion

WHALEY, Chief Justice, delivered the opinion of the court:

This is a suit to recover for the loss of the power capacity of plaintiff's dam on the Willow River caused by the erection by the

defendant of the Red Wing Dam on the Mississippi River. Plaintiff's hydroelectric power plant was at the mouth of the Willow River, which river empties into the St. Croix River. The St. Croix is a tributary of the Mississippi River and is a navigable stream. Plaintiff's dam and power plant was on land owned by it above ordinary high water, but the tailrace from its plant emptied into the St. Croix River below ordinary high water. As the result of the erection by the defendant of the Red Wing Dam on the Mississippi River the water level of the St. Croix River was raised and backed up into plaintiff's tailrace.

The case presents several issues, the first of which is whether or not the Willow River is a navigable stream. If it is a navigable stream, then plaintiff's rights in its dam and power plant were subject to the paramount right of the defendant to take all necessary measures to improve navigation. *United States v. Chandler-Dunbar*, 229 U. S. 53, 62; *United States v. Chicago, Milwaukee, St. Paul, & Pacific Railroad Co.*, 312 U. S. 592, 595.

The Supreme Court of Wisconsin, in *Willow River Club v. Wade*, 100 Wis. 86; 76 N. W. 273, held that this river was a navigable stream. The Willow River ran through the property of the plaintiff, Willow River Club. The action was brought to recover damages alleged to have been suffered by the plaintiff by the catching of fish in that part of the Willow River which ran through its property. Under the Wisconsin law, if the river was navigable, then the defendant had the right to catch fish in any part of the river, because the title to the bed of navigable streams was in the State. The court held that it was navigable and denied recovery. The stream was held to be navigable because the proof showed that a long time previously logs had been floated down the river in times of spring freshets. This was the only proof that the river had ever been used, or in its natural state was capable of use, for commerce and the transportation of persons and property.

However, in a later case the Wisconsin Supreme Court rejected this as a test of navigability in a case involving the right of the defendant to construct a dam across one of the rivers of the State. The Mill Dam Act (chapter 146, Statutes of Wisconsin, 1898) permitted the erection of dams on nonnavigable streams but prohibited their erection on navigable streams without the consent of the State. The proof in that case (*Allaby, et al. v. Mauston Electric Service Co.*, 135 Wis. 345, 351; 116 N. W. 4, 6) showed that logs, had been floated down the stream in question, but the court said:

“* * * From these considerations we are constrained to the conclusion that the testimony which tended merely to show that

this stream was so capable of floating logs that the public might be entitled to right of highway therein for that purpose was wholly insufficient to establish that it was navigable within the meaning of chapter 146."

The decision in this case weakens the authority of the decision in *Willow River Club v. Wade*, supra.

However, in a suit such as the one in the case at bar, navigability is a Federal question, and Federal courts are not bound by the decisions of State courts thereon. *Economy Light & Power Co. v. United States*, 256 U. S. 113, 123; *United States v. Holt State Bank, et al.*, 270 U. S. 49, 56.

Under the decisions of the United States courts it is clear that the mere fact that logs are floated down a stream in times of high water does not make the river navigable in the sense that the United States under its commerce power has paramount rights in the stream in the interest of navigation. *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 698-699; *United States v. Utah*, 283 U. S. 64, 87.

There has been no decision of a Federal Court on the navigability of the Willow River. Whether or not it is navigable is a question of fact. *The Daniel Ball v. United States*, 10 Wall. 557; *United States v. Utah*, supra.

We are clearly of the opinion that the Willow River is not a navigable stream in the sense that the United States may regulate commerce thereon. There is no commerce thereon to be regulated and there never has been. The only transportation the river has ever afforded is to float down logs in times of spring freshets. Except at these times logs cannot be floated down the river. The river is but 40 miles long in a straight line and 70 miles long following its meanders. In some places it is so narrow that the branches of trees on one bank are interlocked with the branches of trees on the other bank. The depth of the water varies from 2 inches to 12 or 14 inches. Fencing extends across the stream in agricultural areas. The stream has never been meandered by the Government. Since the erection of dams by the plaintiff the pools created by them are used for recreational purposes only. The proof is entirely insufficient to show that the river in its ordinary condition or with artificial aids is suitable for commercial navigation. *The Daniel Ball v. United States*, supra; *United States v. Appalachian Electric Power Co.*, 311 U. S. 377.

Liability of the defendant, therefore, depends upon whether or not the level of the St. Croix River was raised above ordinary high-water mark. It had a right to raise the level of the river to ordinary high-water mark with impunity, but it is liable for the tak-

ing or deprivation of such property rights as may have resulted from raising the level beyond that point. Kelley's Creek & Northwestern Railroad Co. v. United States, No. 44631, C. Cls., decided October 4, 1943, and cases there cited.

The proof shows clearly that the ordinary level of the St. Croix River was raised to 675 and a fraction feet. The plaintiff says that ordinary high-water mark before the level was raised was at elevation 672 feet, and the defendant says it was 676 feet. We are satisfied from the proof that it was not higher than 672 feet.

The plaintiff has introduced numerous photographs showing large trees standing in the water after the raising of the level. These are standing in depths of water varying from 1.2 feet to 4.7 feet. This was at a time when the level of the river was at its ordinary level of 675.3 feet. The defendant itself introduced hydrographs showing the levels of the river at Hudson, where plaintiff's plant was, and at Stillwater, some miles upriver from plaintiff's plant, and at Prescott, where the St. Croix empties into the Mississippi. The hydrographs at Hudson begin in

37 May of 1936. An examination of these hydrographs shows spring floods beginning in March or April and lasting through June and into July. After the subsidence of these floods these graphs show that the river maintained a level varying between 667 feet and 670 feet until the erection of the Red Wing Dam on the Mississippi River on August 12, 1938, since which time the graphs show that the ordinary level of the river is at about 675 feet. In November of 1939 the gates in the Red Wing Dam were opened, and the graphs show that during the period they were open the level of the river fell from 675 feet to 672 feet. There is no doubt in our minds that plaintiff's experts are correct in their testimony that the ordinary high-water mark before the erection of the Red Wing Dam did not exceed 672 feet.

The defendant says that it did not take any portion of plaintiff's property, that it merely decreased the head of plaintiff's dam, and that plaintiff is not entitled to recover therefor as for a taking. This position, however, is contrary to the decision of the Supreme Court in *United States v. Cress*, 243 U. S. 316, 329, 330. Two cases were discussed in that opinion. With reference to No. 718 the court said:

"In No. 718 there is a contention that, because the backwater is confined to Miller's Creek, it does not amount to a taking of land. But the findings render it plain that it had the necessary effect of raising the creek below the dam to such an extent as to destroy the power of the mill dam that was essential to the value of the mill; or, as the findings put it, 'The water above the lock and

dam, when it is at pool stage, is about one foot below the crest of the mill dam, which prevents the drop in the current which is necessary to run the mill.' Under the law of Kentucky, ownership of the bed of the creek, subject only to the natural flow of the water, is recognized as fully as ownership of the mill itself. The right to have the water flow away from the mill dam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land."

The authority of this case is somewhat weakened by the court's opinion in *United States v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, supra, in which the court said, "What was said in the Cress case must be confined to the facts there disclosed"; but the 38 facts of that case on this point are identical with the facts here. The case has not been overruled and we have no option but to follow it. It results that plaintiff is entitled to recover the value of the decrease in the head of its dam.

The exact determination of that value is difficult from the proof introduced. We are furnished with involved calculations, such as we might expect and perhaps have a right to expect from engineers specializing in hydroelectric fields. But the amount of just compensation to be awarded may not include one factor to the exclusion of all others—it is a far more complex proposition than, say, the mere ascertainment of quotations on the exchange, usual returns on investments, or mathematical formulae. *Hetzel v. Baltimore & Ohio R. Co.*, 169 U. S. 26; *Standard Oil Co. v. So. Pacific Co.*, 268 U. S. 146; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359; *Story Parchment v. Paterson Paper Company, et al.*, 282 U. S. 555.

Among the factors to be taken into consideration is such an amount as when capitalized at a certain percentage will produce yearly the revenue which plaintiff has lost by reason of the reduction of power caused by the backing up of water into the tailrace.

Taking all relevant proof into consideration, we have arrived at an amount of \$25,000, by way of a jury verdict, as justly compensating the plaintiff for that which the defendant has taken from it, as of the time and place of taking, adding thereto and as a part thereof $4\frac{1}{2}$ per cent per annum on \$25,000 from August 12, 1938, down to the date of payment of judgment.

Judgment is rendered accordingly. It is so ordered.

MADDEN, Judge; WHITAKER, Judge; and LITTLETON, Judge, concur.

*Plaintiff's Exhibit No. 5—Made a part of the
court's findings by reference*

This agreement, made this 10th day of October A. D. 1938, by and between Northern States Power Company, a Wisconsin corporation, party of the first part, hereinafter called the "Company," and the Willow River Power Company, a Wisconsin corporation, party of the second part, hereinafter called the Customer":

Witnesseth: That the parties hereto, each in consideration of the agreements of the other, agree as follows:

1. The Company will supply electric service in the form of three phase, alternating current at approximately 2,300 volts and 60 cycles per second, to the extent of Five Hundred (500) Kilowatts of Demand, for Customer's use for light, heat, and power, for public and private use in the communities and rural areas now served from customer's transmission and distribution system. Said power shall be available for Customer's use and will be supplied subject to agreements contained herein and in "Terms and Conditions" attached hereto and made a part hereof; energy to be delivered at Customer's substation at Cedar Falls and metered at Company's switchboard as now located in its hydroelectric generating station at Cedar Falls.

2. In order to permit the energy above specified to be delivered to the Customer, the Customer agrees to extend its transmission line from Knapp, Wisconsin, to the point of delivery above specified, and to provide the necessary transformers, switches, and protective apparatus so that Customer will be in a position to take energy to the extent and at the voltage, phase, and frequency heretofore described.

3. Customer agrees to use power only as herein stated, and will not assign this Agreement except upon written consent of the Company.

40 4. It is understood that the energy to be supplied the Customer hereunder is to be used as auxiliary to Customer's own generating facilities in supplying the requirements of its patrons, and that Customer shall have the right to exceed the Demand specified in Section 1 hereof up to an aggregate demand of One Thousand (1,000) Kilowatts, upon reasonable notice to Company from Customer specifying the additional amount of power and the date same will be required.

5. Customer agrees to pay at Company's office in Eau Claire, Wisconsin, or at such other place as Company may designate, on

or before the tenth day succeeding the date of bill rendered, for service supplied in the previous month at the following schedule of rates:

DEMAND CHARGE

First 25 kilowatts or less of billed demand, \$62.50 per month.
Next 25 kilowatts of billed demand @ \$2.50 per kw. per month.
Next 150 kilowatts of billed demand @ \$2.00 per kw. per month.
Excess kilowatts of billed demand @ \$1.25 per kw. per month.

plus

ENERGY CHARGE

First 10,000 kilowatt-hours per month @ 2.0¢ per kilowatt-hour.
Next 20,000 kilowatt-hours per month @ 1.5¢ per kilowatt-hour.
Next 70,000 kilowatt-hours per month @ 1.0¢ per kilowatt-hour.
Excess kilowatt-hours per month @ 0.8¢ per kilowatt-hour.

SUBSTATION DISCOUNT

First 100 kilowatts of billed demand 20¢ per kilowatt per month.
Excess kilowatts of billed demand 15¢ per kilowatt per month.

PROMPT PAYMENT PROVISION

A discount of 5% on the first \$25.00 and 1% on the excess of the total bill will be allowed for payment within the discount period.

DETERMINATION OF DEMAND

The Maximum Demand in kw. and reactive kv.-a. shall be determined as the highest average rate at which energy and reactive kv.-a. hours, respectively, are used for any period of fifteen (15) consecutive minutes during the month.

41

DETERMINATION OF BILLED DEMAND

1. Standard watt-hour and reactive component meters equipped with maximum demand attachments will normally be used for metering three-phase loads, and the demand upon which the demand charge shall be computed (except in such emergencies as are provided for in Section 6 following) shall be determined as follows:

a. If the ratio of maximum reactive kilovolt amperes to maximum kilowatts is less than 75%, the maximum registered kilowatt demand shall be used for billing purposes.

b. If the ratio of maximum reactive kilovolt amperes to maximum kilowatts exceeds 75%, the demand for billing purposes shall be determined each month by the following formula:

Billed demand equals 0.8 times the square root of the sum of the squares of the kilowatt demand and the reactive kilovolt ampere demand.

c. Reactive component meters will be ratcheted so only lagging reactive kilovolt-ampere hours will be recorded.

2. In no month shall the Billed Demand be considered as less than the highest demand previously billed under this contract, nor in any event less than 100 kw.

6. In case of emergency on Customer's system caused by fire, explosion, flood, or windstorm, the Company agrees to supply Customer the electrical energy requested by it to the extent of Company's ability to supply the amount requested without injury or inconvenience to itself or its other customers. Upon notification that such emergency exists the Company will read the Company's meters as soon as possible and will, upon notification that such emergency is over, again read the meters for the
42 purpose of determining the energy supplied during said emergency. The energy supplied between said meter readings will not be considered in determining the monthly bill in accordance with Section 5 above, but will be billed separately at the rate of 2.5 cents (\$0.025) net per kilowatt-hour and Customer shall pay said bill within ten days from date thereof. Notification of emergency shall be given to the Company's plant operator at Cedar Falls or such other person as Company may designate in writing.

7. Customer further agrees that service to be supplied hereunder is contingent upon the Company having the necessary permits and rights-of-way to enable the Company to carry out the terms of this Agreement.

8. This Agreement shall continue in force for a term of Ten (10) Years, commencing on the 12th day of April 1939, provided, however, that the Customer shall have the right to cancel this Agreement at the end of the first five-year period hereof by giving written notice of its intention so to do to the Company six months prior to the expiration of such five-year period.

In witness whereof, the respective parties hereto have caused this Agreement to be executed in duplicate by their proper officers thereunto duly authorized, and their respective corporate seals to

be hereunto affixed, and the same shall be equally binding upon the respective parties, and each of their successors and assigns.

[CORPORATE SEAL]

NORTHERN STATES POWER COMPANY,
By G. O. RORK,
And G. M. GOBLIN.

[CORPORATE SEAL]

WILLOW RIVER POWER COMPANY,
By ALFRED R. SCHULTZ, *President*.
And BERTHA A. BURKHARDT, *Secretary*.

In Presence of:

ALMA LIEN.

ALMA SCHULZ.

JOSEPHINE G. MURPHY.

CHRISTINE CASANOVA.

43. TERMS AND CONDITIONS REFERRED TO AND MADE A PART OF
THIS AGREEMENT

1. Electrical energy will be supplied and measured by the Company at the switchboard of the Company in the form of three-phase alternating current, at a nominal voltage of twenty-three hundred (2,300) and a nominal frequency of sixty (60) cycles per second, and shall not be subject to fluctuations of potential or frequency of sufficient extent to interfere with the proper operation of power apparatus duly installed hereunder.

2. The Company shall connect its lines to the lines of the Customer at the substation of the Customer.

3. The Company shall, at its own expense, furnish, install, and keep in repair the necessary meters and other current measuring devices.

The Customer may, at its option, and at its own expense, install a duplicate or check demand meter, and a duplicate or check watt-hour meter alongside those of the Company for the purpose of checking the Company's meters, and in the event of failure of the meters so placed to check with each other, either party shall have the right to call upon the other for a test of one or both of such meters, which test shall be made by a competent disinterested third party to be selected by the parties hereto. Such test shall be made by such third party promptly and not later than thirty (30) days after his selection, and in the presence of the representatives of each of the parties hereto. In the event of error in the Company's meter or meters exceeding two percent (2%), proper allowances, as shown by the test, shall be made to the party entitled thereto, but not for a longer period than sixty (60) days prior to the time such inaccuracy is proven.

The cost of all tests shall be paid by the party requesting the same, but if, at any test, the Company's meter shall be found to be in error exceeding two percent (2%), the cost of such tests shall be borne by the Company.

4. All wiring, and other electrical equipment or apparatus on the Customer's side of the Customer's service outlet, shall be furnished and installed and kept in repair by the Customer, and the Company shall not be required to supply or to continue to supply any current hereunder unless such wiring, equipment, and apparatus are, from time to time, duly approved by the Company.

5. The Company shall at all times exercise due diligence in operating its plant so as to furnish the Customer, as nearly as practicable, an uninterrupted and regular supply of electrical energy. But in case the Company shall be prevented from delivering electrical energy, wholly or in part, by fire, explosion, flood, strike, or unavoidable accident, Federal, State, or Municipal interference, or any other cause not reasonably within its control, it will (except in case of a practically total destruction of its property, or practically total suspension of its business) proceed with all reasonable diligence to put itself and its works in condition to continue the supply of electrical energy, and such partial or total interruption of service shall not constitute a breach of this contract, nor shall the Company be liable for damages by reason of failure from any of said causes. Proportionate reduction in such case shall be made from the amount of the monthly demand charge payable under the provisions of this contract.

44 6. If the Customer, on account of unavoidable accident, fire, explosion, flood, strike, Federal, State, or Municipal interference, or any other cause not reasonably within its control, be prevented wholly or partially during the term of this contract, from receiving, taking, and using the current delivered by the Company, the Customer agrees to proceed with all reasonable diligence to put itself and its works in condition again to utilize the normal amount of current; and in case of such shut-down or interference, if the Customer shall have promptly given notice in writing to the Company, at its office, at Eau Claire, Wisconsin, or any other office hereafter designated by the Company, of the shut-down or interference, the probable duration and cause thereof, the operation of this agreement and the obligation of the Customer hereunder to take and pay for electrical energy shall be suspended to the extent of such shut-down or interference, during such period of interruption, and proportionate reduction shall be made from the amount of the monthly demand charge payable under the provisions of this contract.

7. The Company may at any time during the term of this contract, on Sunday morning, between the hours of one (1) and six (6) o'clock, suspend delivery of electrical energy under this contract for the purpose of making repairs on or improvements in, upon, or around any part of its hydroelectric or generating plants or distributing system; provided, however, that the Company shall, in every case, give the Customer such reasonable notice thereof as circumstances will permit.

8. If the Customer shall make default in any of its agreements herein contained, the Company may, on thirty (30) days' notice in writing to the Customer, suspend delivery, such suspension not to interfere with enforcement by the Company of any legal right or remedy. No delay by the Company in enforcing any of its rights hereunder shall be deemed a waiver of such rights; nor shall a waiver by the Company of one of the Customer's defaults be deemed a waiver of any other or subsequent defaults.

45

SUPPLEMENTARY AGREEMENT

This Agreement, made this 10th day of October 1938, by and between the Northern States Power Company, a Wisconsin corporation, hereinafter called the "Company," and the Willow River Power Company, a Wisconsin corporation, hereinafter called the "Customer," witnesseth:

Because of the lack of sufficient knowledge as to the operating characteristics of the Customer's system when electrical energy is furnished to it under the contract between the parties hereto of even date herewith, it is hereby stipulated and agreed that for a period not exceeding three months after energy is first supplied hereunder Customer will be billed for 100 kw. demand, even though the demand recorded is in excess of this amount.

During this three month period the Customer agrees to ascertain and determine the amount of power required for its use, the extent of variations in power required, the extent of unavoidable variations because of physical limitations of the Customer's system, and the modifications of Customer's methods of operation necessary for proper operation of Customer's system.

It is further agreed that this Agreement shall modify said Agreement of even date herewith only to the extent herein specifically provided.

In witness whereof, the respective parties hereto have caused this Agreement to be executed in duplicate by their proper officers thereunto duly authorized, and their respective corporate seals to be hereunto affixed, all on the day and year first above written,

and the same shall be equally binding upon the respective parties, and each of their successors and assigns.

[CORPORATE SEAL]

NORTHERN STATES POWER COMPANY,
By G. O. RORK.
And G. M. GOBLIN.

[CORPORATE SEAL]

WILLOW RIVER POWER COMPANY,
By ALFRED R. SCHULTZ, *President*.
And BERTHA A. BURKHARDT, *Secretary*.

In Presence of:

ALMA LIEN.
ALMA SCHULTZ.
JOSEPHINE G. MURPHY.
CHRISTINE CASANOVA.

46

Judgment of the court

Feb. 7, 1944

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is entitled to recover the sum of \$25,000, with interest at $4\frac{1}{2}$ percent per annum, from August 12, 1938, to the date of payment of judgment, not as interest but as a part of the just compensation.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of twenty-five thousand dollars (\$25,000), with an additional amount measured by interest at the rate of four and one-half ($4\frac{1}{2}$) percent per annum on twenty-five thousand dollars (\$25,000) from August 12, 1938, to the date of payment of the judgment, not as interest but as a part of the just compensation.

48

Proceedings after judgment

On April 6, 1944, the defendant filed a motion for a new trial.

On May 1, 1944, the court entered the following order on said motion:

ORDER

It is ordered this 1st day of May 1944, that the defendant's motion for a new trial be and the same is hereby overruled.

On June 14, 1944, the defendant filed a motion for leave to file "notice of intention to file petition for certiorari" in lieu of petition for certiorari as required by Rule 99 (a), and said motion was allowed on June 15, 1944.

On June 15, 1944, the defendant filed a request for record in re certiorari together with other portions of the record proposed by defendant, and its intention to file petition for certiorari and specification of errors.

50

Proceedings after judgment continued

On June 23, 1944, the plaintiff filed a motion to extend time to July 3, 1944, for filing copies of parts of the evidence considered material for the record in re certiorari under Rule 99 (a), and said motion was allowed June 23, 1944.

On July 3, 1944, the plaintiff filed its application for additional parts of record in re certiorari under Rule 99 (a), together with the other parts of the record so requested.

52

Order of court settling record

July 12, 1944

The within transcript prepared from the original record in this court in the above-styled case having been proposed in part by defendant and in part by plaintiff as that portion of the record material to the errors assigned in the defendant's notice of intention to file a petition for a writ of certiorari, and neither party having objected thereto, and such transcript having been considered and found to be an accurate statement of the portions of the original record material to the errors assigned, the same is (with the exception of the report of the commissioner, the defendant's exceptions thereto and request, and defendant's motion for a new trial and for amended and additional findings of fact requested by the defendant) this 12th day of July 1944, hereby settled and approved.

By the court :

RICHARD S. WHALEY,

Chief Justice.

56

[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

Order allowing certiorari

Filed October 9, 1944

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Vol. 2

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 312

THE UNITED STATES, PETITIONER

vs.

WILLOW RIVER POWER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 1, 1944

CERTIORARI GRANTED OCTOBER 9, 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 312

THE UNITED STATES, PETITIONER

vs.

WILLOW RIVER POWER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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No. 45067

In the United States Court of Claims

WILLOW RIVER POWER COMPANY, A WISCONSIN CORPORATION

v.

THE UNITED STATES

Excerpts from transcript of evidence

Plaintiff's witness, ALFRED R. SCHULTZ.

Direct Examination by Mr. RIESER:

53. Q. Now you spoke about the St. Croix dam being erected in 1866. Are the water wheels of the St. Croix dam, the generators, and the turbines located in the channel of the Willow river at or near the mouth, or are they erected some place else?

A. The present water wheels are erected, and the plant, between the Willow river and the St. Croix river or lake.

54. Q. Has that manner of operation existed for a good many years?

A. Yes.

55. Q. Prior to 1900?

A. Yes.

56. Q. For a number of years prior to that time too, according to your information?

*A. Yes. I don't know the exact year, however.

57. Q. Now then, you say that the generators and the turbine of this St. Croix dam are ~~not~~ at the mouth. How was the operation constructed so as to permit that, if you can explain generally?

36 A. The operation at that particular plant was installed for milling purposes, and at the present site of the St. Croix plant there was a channel cut across the land in the narrow neck to permit discharging the water directly into St. Croix lake from the reservoir.

58. Q. By that you mean there was a channel dug and these generators placed into that new channel?

A. Yes.

59. Q. And that channel, was that built on land that was owned by your company, or the former Burkhardt Milling Company?

Mr. Cox. I object to that —

A. It was owned by the Burkhardt —

Mr. Cox. The question of ownership. That is not the best evidence as to ownership.

60. Q. I will just ask you this: was that constructed on land described as Section 23 and 24, in Township 29 north of Range 20

west, and Sections 13, 18, and 19 in Township 29 north of Range 20 west?

A. Yes.

61. Q. Now, what is there across the channel of the Willow river to hold the water back there?

A. There is a dike extending in an east-west direction along Bridge street. In the western portion of this dike there is a flume and gate, at which position at one time a grist mill was located and operated before the Power Company obtained possession of the land.

62. Q. But while the Burkhardt Milling Company had it?

A. The dike was built prior to that time.

37 63. Q. And was that built prior to 1900?

A. Yes.

64. Q. And has that been in substantially the same condition since your acquaintance with that operation?

A. Yes; there was one repair job prior to 1897, a part of that earthen embankment was washed out and it was repaired and brought to its original position.

65. Q. In about 1897, you say?

A. I think it was a little earlier than that, about 1894.

66. Q. Since then there has been no generation of energy or use of energy out of the channel or through the channel of the St. Croix River at that point, is that right?

A. Not since I joined the company.

67. Q. Now then, this dam here, or this place where the cut was made in the land to permit the installation of the generators, has there been some repair work done there from time to time, reconstruction?

A. Yes.

68. Q. When was it last done there?

A. The last repair work was done in 1934 and 1935.

69. Q. There had been a wash-out there and it was replaced?

A. The excessive flood of 1934 washed out the north part and weakened the portion south of the powerhouse. That went out in 1935.

38 170. Q. I show you now exhibit for identification "D-1" to "D-4," inclusive, and ask you whether those pictures reflect the condition of the river at about the time of the flood that carried out the generators and the fill to the north of those generators?

A. Yes.

Mr. Cox. Is that 1934 or 1935?

A. 1934, after the north portion of the dam washed out. I think that is quite early in the year, probably sometime in April.

171. Q. In April 1934?

A. 1934.

172. Q. And then Exhibit "D-1"—is the pipe and the concrete that is showing there—is that the edge of the spillway shown on about the center of Exhibit "D-2"?

A. Yes. It is the northernmost remnant of what was left of the gates of the old dam.

173. Q. And this area between the concrete and the mainland shown to the right, upper right hand of the picture, that was what was washed out?

A. Yes. That was the native soil that was between the Willow river and the St. Croix.

Mr. Cox. This was also in 1934?

A. Yes.

174. Q. That reflects about the condition at that time, is that right?

A. Yes.

39 181. Q. In exhibit "D-2" there are some sort of darker spots throughout the area toward the bottom of the picture that look like stumps. Is that what they are?

A. Yes; they are old tree stumps on the floor of the reservoir above the St. Croix dam.

182. Q. Then the area toward the bottom of Exhibit "D-2" is part of the old reservoir—or reservoir?

A. All the area from the plant as far as the picture shows is part of the floor of the old reservoir.

183. Q. And what was the size of some of those stumps?

A. Oh, two and one-half feet in diameter; eighteen inches to two and one-half feet in diameter.

184. Q. Is it true that the dam that you now use has a spillway, that you have described here earlier in the testimony, is to the left of this picture "D-2"; is that right?

A. Yes. Some distance to the left.

185. Q. That is the part that is used as a spillway that is built across the Willow river itself, is that right?

A. Yes; only we don't use it as a spillway. There is a gate there, but we haven't had it open for years.

186. Q. Now, I show you Plaintiff's Exhibit "E-1" to "E-4," inclusive, and ask you, first of all, when those were taken.

A. They were taken on April 5, 1942.

187. Q. Did you take those?

A. Yes.

40 188. Q. Do they reflect the conditions they purport to show as of about that date?

A. Yes.

189. Q. And are taken of the area involved in this proceeding, is that right?

A. Yes. The powerhouse shown on a number of the pictures is the St. Croix plant powerhouse.

190. Q. And the rest of them show the St. Croix river near its mouth?

A. The Willow river below the dike across Willow river. And the other one shows the direction of the river to the interstate bridge, although the channel of the Willow river is flooded out.

191. Q. Exhibit "E-2"?

A. It shows the results from the main railroad of the Chicago & Northwestern along the west bank of their embankment at the St. Croix plant.

192. Q. And shows the St. Croix plant, does it, in the distance, right in the immediate center of the picture?

A. Yes; powerhouse and gates.

193. Q. Exhibit "E-1"—what is that? From what direction of the dam is that shown?

A. That was taken from the north and looking southwest toward the Hudson passenger depot. You can see the depot in the extreme right hand of the picture, the water tower at the other, and then the east boundary of Lake St. Croix or the
41 St. Croix river, around to the dike at the powerhouse.

194. Q. Is it true that the dam would be beyond the foot of the picture here—is that right—if continued?

A. The one across the Willow river; yes. The tainter gates are shown right adjacent to the power plant building, with the hoist in the left-hand side of the picture.

Mr. Cox. Is this an —

The COMMISSIONER. Do you want to object on the record?

Mr. Cox. I would like to identify this.

By Mr. Cox:

195. Q. The object there which projects into the St. Croix river, just about the center?

A. I would say that that is the north wall of the flume coming out of the powerhouse.

By Mr. Cox:

196. Q. And extending into the St. Croix river?

A. Yes.

197. Q. (Mr. RIESER continuing.) And that was taken at a time when the St. Croix river was at elevation 676.6; is that right?

A. That may be a little deceiving for that reason. The water is high on that projection, but that is the north wall of the flume permitting the water from the water turbines to get out into the lake.

198. Q. Exhibit "E-1"—is it true it looks downstream from—down the St. Croix from your dam; is that right?

A. Yes; the view is taken toward the southwest.

42 199. Q. And Exhibit "E-2" is looking up toward the dam, along the same area, is that right?

A. Yes; it is almost looking north.

200. Q. In connection with your operation of the St. Croix dam prior to the building of the Red Wing dam, were you in the habit of observing and did you know about how, under normal conditions, the water discharged into Lake St. Croix or the St. Croix river?

A. Yes.

201. Q. And, as a matter of fact, had you—when water was very low, what was the lowest elevation that you had observed in years prior to—say, during the ten years prior to 1938—on the St. Croix river?

A. The lowest surface water on Lake St. Croix was 666—I don't remember whether it was .5 or .6 or .7—somewhere along in there. A fraction above 666.

202. Q. And what is the occasion for you remembering that elevation? Did you have to do something in connection with your operation there to—

A. I don't recall at present any specific thing that we were doing. We had repairs at the St. Croix plant a number of times.

203. Q. Did you extend this flume any at that time, or about that time?

A. The particular work connected with the low stage was the water wheel draft tubes were out of the water so that we
43 couldn't get good operation and we had to extend them down to a lower level.

204. Q. Now then, that, you would say, was the lowest stage of water during your operations there?

A. The lowest that I have any definite knowledge on; yes.

ALFRED R. SCHULTZ, witness on behalf of plaintiff.

Cross-examination by Mr. Cox:

309. Q. Do you know when the natural mouth of the St. Croix of the Willow river was damned or stopped?

A. From the records the dam was built in 1866.

311. Q. That was built at the natural mouth of the Willow river, was it not?

A. It was upstream from the mouth.

314. Q. No remains of that old dam now, are there?

A. I always understood it was the same structure across there, maintained from year to year, but I have no knowledge of what the dam in 1866 was like, other than what is there now.

315. Q. But your present hydro plant—your present St. Croix hydro plant—is situated on a strip of land between what is known as Lake Mallalieu and the St. Croix river, it is not?

A. Yes.

316. Q. And that strip of land is approximately one hundred feet to one hundred and fifty feet in width?

A. It varies from point to point. I would say up to two hundred and fifty feet, somewhere in that neighborhood.

317. Q. At the narrow point where you have cut through that strip of bank it is approximately not exceeding one hundred feet, is it?

A. Yes. I would say one hundred and twenty-five to one hundred and fifty. It is well above a hundred feet.

* * * * *

332. Q. Now, as I understand your testimony, your St. Croix plant, or rather the north bank, or the bank extending northward from your St. Croix plant, washed out in 1934?

A. Yes.

333. Q. And also in the 1934 flood your tainter gates washed out, is that correct?

A. Yes. One remained in place. It was damaged so that it had to be removed.

334. Q. But in 1935 your powerhouse and a considerable portion of this strip of land to the south of the powerhouse washed out?

A. Yes.

* * * * *

352. Q. The Willow river had washed out a new mouth there at the point of your plant, hadn't it—had effected a new mouth to the St. Croix river?

A. Well, it washed out an opening across that land for a distance north and south of the old powerhouse.

* * * * *

379. Q. Mr. Schultz, your St. Croix powerhouse and a wing wall extends out therefrom to the westward, extend towards the St. Croix river, do they not?

A. Yes; the wing wall is only on the north part of the gate section.

45 380. Q. Do you know to what approximate elevations the foundations of those structures extended down into the bottom of the St. Croix river after they were reconstructed in 1935?

A. Not from memory.

GEORGE E. ACKERMAN, witness on behalf of plaintiff.

Direct examination by Mr. RIESER:

72. Q. You tell us where the lower part of the head of a dam begins in determining the head of the dam?

A. The head is measured from the elevation of the head water at the entrance to the turbines. The tail water is measured as the elevation of water at the discharge end of the draft tubes.

73. Q. What was the head of this dam after you rebuilt it in 1934 and 1935?

A. That varied with the elevation of the—the operating head varied as the elevation of the tail water varied.

74. Q. Assuming there was no interference from tail water, what would have been the head then?

A. At certain periods of the year, when the St. Croix river was low, the head would be in the neighborhood of twenty-two and one-half feet.

75. Q. So it ranged from twenty-two and one-half feet to zero, depending upon how high the St. Croix river was?

46 A. I have never seen it at zero. I have seen it as low as eight feet difference between head water and tail water.

Mr. Cox. You say you have seen the head water down to eight feet?

A. Approximately eight feet; yes.

76. Q. That was during floods on the St. Croix river?

A. Yes.

* * * * *

134. Q. Now then, in arriving at your estimate or conclusions as to what, if any, damage resulted and what, if any, effect upon the system resulted from the raising of the water in the St. Croix river, on what principle do you proceed, Mr. Ackerman, as to how damage is determined?

A. The first step is to examine the records showing the elevations of the tail water.

135. Q. Those are records that have been introduced here?

A. Yes, sir.

136. Q. Then in what order do the steps come?

A. From those records we are able to determine the head, the operating head, on the power plant at any given time, and we are able to determine the average head over periods of time. We also

have records or data showing the elevation of the tail water since the Red Wing dam was constructed. By comparison of the records and the heads obtaining before the Red Wing dam was constructed with the heads obtaining after the Red Wing dam was constructed, we are able to determine the loss in power, reduction in operating head, and with that data, knowing the previous output of the power plant over a considerable period of years, we are able to compute the production that would have taken place or that the power plant would have been able to make in the same period if the head had been reduced. We are able thus to determine the approximate number of KW hours of energy lost by the power plant due to the reduction in head.

136. Q. All right; and is that the method by which you have proceeded in arriving at your conclusions in this matter?

A. Yes.

137. Q. Now then, what is the equipment installed at the St. Croix plant in the way of generators, and what kind are they?

A. Generators?

138. Q. Yes; the generating units as a whole?

A. The power plant is equipped with two vertical direct connected hydroelectric units, and these units consist of vertical type open flume water wheels, each having a full gate rating of approximately two hundred and sixty horsepower. On the generator end each unit consists of a generator rated at one hundred and fifty KW in capacity. There are no gears interposed between the turbine and the generator. The shaft of the turbine is connected directly to the vertical shaft of the generator.

ALFRED R. SCHULTZ, witness on behalf of plaintiff.

Cross-examination by Mr. Cox:

496. Q. Did the government take and occupy, or does it now use or did it ever heretofore use, any part of your powerhouse, machinery, or equipment?

Mr. RIESER. If you confine that to "use," I will not have any objection. But if you say "take, occupy, and use" I must object as a legal conclusion, or it includes a legal conclusion.

Mr. Cox. Very well.

497. Q. Does it occupy, or did it ever occupy, your powerhouse or any of the equipment therein?

A. It destroyed the use—

498. Q. I am not talking about destroying. I want to know whether the government ever physically occupied—

A. Not the powerhouse; no.

Mr. RIESER. The question included also some of your other equipment in the powerhouse.

499. Q. Or did it ever occupy or use any of your equipment or machinery in the powerhouse?

A. The only portion would be the draft tubes, to my mind, that they probably did occupy. As far as the instruments in the powerhouse goes, no.

500. Q. You mean the draft tubes there may have been
49 submerged by water?

A. Yes; and it occupied it so we couldn't make use of it.

501. Q. But it never used it, did it—the government never used your draft tube?

A. Not to run water through; no.

* * *
504. Q. Whether you have been physically ousted of any of your property there, of your land or of your powerhouse or the machinery therein?

A. I would say we were ousted from the land and the use of our machinery as I understand the word "oust" for the property that we have been making use of.

505. Q. I am using the word "oust" in the sense of being dispossessed?

A. Yes; I would say "yes."

506. Q. Very well; now what part of your land, powerhouse, or machinery have you been dispossessed or ousted?

A. I would say we have been dispossessed of the lower portion of our draft tube and the two generators we are using and of the land below the dam across Willow river.

507. Q. In what way? In what manner?

A. That we can't use it. It is flooded so that we can't get down on that land.

508. Q. Have you been dispossessed or ousted of any land below elevation 676?

A. Yes.

509. Q. What part?

50 A. This same part that I referred to before. That is the only land that we have—

* * *
511. Q. Now, as a matter of fact, you are still operating your St. Croix plant and generating power and distributing it right at this very moment, are you not?

A. Partly.

GEORGE E. ACKERMAN, witness on behalf of plaintiff.

Direct examination by Mr. RIESER:

280. Q. Now, Mr. Ackerman, in the procedure that you have followed here, is that one that is commonly used in your profession and particularly in your practice in the past in arriving at estimates of the relative value of a water power development, say, to a development of comparable capacity by steam or diesel?

A. Based upon my experience, it is the fairest and the most reasonable method that I know of that can be used.

281. Q. And the plan that you followed out here is a plan that you have used before and would use in advising a client with respect to either the construction of a plant or the purchase of one?

A. It is the plan that I have used in the past in numerous problems. It is the plan that I would use in the future.

282. Q. Or would you use in the event that you were to advise with reference to the purchase or sale of the Willow River Power Company in determining whether or not this water had affected, and the elevation of the water in this dam had affected, the value of this property?

GEORGE E. ACKERMAN, witness on behalf of plaintiff.

Direct examination by the COMMISSIONER:

387. Q. As a practical matter in the design, I wanted to know the maximum head, the way the equipment is installed, and the way the dam is built; what is the maximum head?

A. I would say twenty-two and one-half feet.

388. Q. Twenty-two and one-half feet?

A. Very close to twenty-two and one-half feet.

GEORGE E. ACKERMAN, witness on behalf of plaintiff.

Cross-examination by Mr. Cox:

292. Q. Does that indicate to your mind any loss of the power to produce at the St. Croix plant by reason of the increased height of Pool No. 3 above the dam at Red Wing?

A. It does indicate a distinct loss due to the interference.

393. Q. May I ask, just to clarify? You stated there, as a maximum head, twenty-two and one-half feet. Is that measured from a full pond in Lake Mallalieu to the lowest water in Lake St. Croix, elevation 666.66 —

A. I gave that as an approximate figure.

393. Q. (Continued.) Or did you measure it from a full pondage in the lake to the average elevation in Lake St. Croix?

A. If we have a headwater elevation of 689—that is, if the water is at the crest of the gates—then an operating head, a gross operating head, of twenty-two feet would mean that the water
52 in Lake St. Croix, at the tail race discharge must be at elevation 666.5.

394. Q. And it varied as the St. Croix river rose; even before the construction of Dam No. 3 that had varied, did it not?

A. As the elevation of Lake St. Croix rose above elevation 666.5, the head would decrease from twenty-two and one-half feet.

RODGER HOOPER, witness on behalf of defendant.

Direct examination by Mr. Cox:

40. Q. (Mr. Cox Continuing.) Mr. Hooper, did you prepare a drawing of the Willow River Power House?

A. It was prepared under my direction.

41. Q. Will you look at that drawing and state what it is?

A. It is a drawing showing the plan and in elevation some of the details of the powerhouse and tainter gate section of the so-called St. Croix dam of the Willow River Power Company at Hudson.

Mr. Cox. Defendant offers in evidence Defendant's Exhibit "8," entitled "Willow River Power Company, U. S. Court of Claims No. 45067, plan and elevations of powerhouse, U. S. Engineer Office, St. Paul, June 1942."

Mr. RIESER. I have no objection, subject to verification, Doctor. I should like to verify —

The COMMISSIONER. Verification in what manner?

Mr. RIESER. Subject to verification as to several of the
53 specifications given on the map. Otherwise, I have no objection.

The COMMISSIONER. All right. Let the exhibit be received as offered, subject to verification.

42. Q. Where did you obtain the data for this map or drawing?

A. By actual physical survey at the site.

43. Q. Did you make the survey?

A. It was made under my direction.

85. Q. Did you have occasion on that day to visit the powerhouse of the plaintiff company?

A. The outside of it. I wasn't inside of it.

86. Q. Did you notice the conditions of the water with respect to the west face of the powerhouse?

A. Yes.

87. Q. What was the condition of the water?

A. Well, the water was flooding out the west edge of the company's property. The water of the St. Croix was on that portion of the dam that extends out.

88. Q. What are those long walls extending out below the tainter gates towards the river?

A. By "below" I take it you mean downstream from the tainter gates?

89. Yes; below the tainter gates?

A. I don't know whether they have an official name. They are apparently some sort of guide wall.

90. Q. Built of what material?

54 A. Concrete. It confines the tailrace from the powerhouse.

91. Q. And approximately how far out beyond the bank do those extend?

A. Well, I would guess—the defendant's exhibit shows that.

92. Q. Would you look at that exhibit and state approximately, as near as you can?

A. Defendant's Exhibit No. 8—I have to add some of these figures together—indicates it is thirty-two feet from the west face of the powerhouse out to the edge of the westernmost crosswalk, their walkway, and about two and one-half feet farther to the end of the most westerly extent of the wall. That would be about thirty-four feet.

93. Q. Will you mark the edge of that concrete wall by an "X" mark in red pencil?

A. Yes, sir; I have done so.

94. To what extent, if you know, does that wall extend down into the bottom of the river; that is, the bottom of the foundation?

A. We measured the elevation of the bottom of that tailrace; that is as near as I can tell you. The foundations, of course, extend down below that.

95. What was the bottom elevation of the tailrace?

A. The bottom elevation of that was 663.2.

55 96. Q. 663.2; and it would extend below that?

A. It would have to or it would be unstable.

97. Q. And rests upon the bottom of the river?

A. Rests into the bottom of the river—extends into the bottom of the river.

98. Q. Were you able to ascertain the depth to which the foundation of the powerhouse extended into the bottom of the river on its west face?

A. No, sir.

M. P. EKBERG, witness on behalf of defendant.

Redirect examination by Mr. Cox:

572. Q. I show you two photographs marked "photographs Nos. 591 and 592," and ask you if you can identify the objects in those photographs and state what they are?

A. Yes; I can identify the objects in these photographs. They are both photographs of the St. Croix plant of the Willow River Power Company.

573. Q. As of what date?

A. March 6, 1940.

574. Q. Can you state the elevation of Lake St. Croix at that time?

A. To my own knowledge?

575. Q. You can refer to the gage records if you like, to refresh your memory.

A. 672.1 at Hudson.

Mr. RIESER. May I inquire, Doctor, what the purpose of this is?

56 Mr. Cox. Just as a matter of general information, for the information of the court, to get a better view of plaintiff's property.

Mr. RIESER. Is there any purpose by this picture to establish any elevation, or any elevation with reference to any other —

Mr. Cox. None whatever.

576. Q. Do you know whether or not those pictures were taken for the official files of the Engineer Department?

A. They are from the official files of the Engineer Department.

Mr. Cox. Defendant offers the photographs in evidence, to be marked "Defendant's Exhibit 22."

The COMMISSIONER. Without objection, let the photographs be received as offered.

Mr. RIESER. What elevation did you say the pool was on the date these pictures were taken?

A. 672.1 at Hudson.

577. Q. What is that line on these concrete walls extending out—concrete walls which extend out into the river?

A. That is a line made by the water standing at its normal pool elevation.

The COMMISSIONER. Are you now referring to Defendant's exhibit 22?

Mr. Cox. Defendant's Exhibit 22.

578. Q. Do you know the reason why the water was drawn down to that elevation at that time?

A. I didn't know about that for sure, and Mr. Wilson testified on that this morning, I believe, and I recall that probably is the

reason it was drawn down. I had nothing to do with that part of the work.

579. Q. I show you another sheet of photographs marked "Photographs Number 593 and 594," and will ask you if you can identify the objects in those photographs?

A. Yes; I can identify the objects in those photographs. The top one is a photograph of a portion of the St. Croix plant of the Willow River Power Company. The bottom photograph on the sheet is more of a general view and shows the entire plant.

Mr. Cox. Defendant offers the photographs in evidence, to be marked as "Defendant's Exhibit 23."

The COMMISSIONER. Let it be received as offered.

580. Q. I show you two other photographs, Numbers 595 and 596, and will ask you if you can identify the objects in those photographs?

A. Yes; I can. They are both photographs of the St. Croix plant of the Willow River Power Company.

581. Q. Are they also official photographs of the Engineering Department?

58 A. Yes, sir. These were taken from the official files of the Engineering Department.

582. Q. And as of what date were they taken?

A. March 6, 1940.

Mr. Cox. Defendant offers the photographs in evidence to be marked as "Defendant's Exhibit 24."

M. P. EKBERG, witness on behalf of defendant.

Re-cross-examination by Mr. RIESER:

586. Q. And the notation on Exhibit 23 with respect to the effect of the normal pool stage being indicated. What do you understand by that reference?

A. There is a well-defined mark on the riprap of the bank and also, of course, the structure.

587. Q. You mean the light area?

A. The light area is below the mark. The mark is rather dark. The COMMISSIONER. What does the mark mean?

A. That mark was made by the water of the pool standing at its normal pool elevation.

588. Q. That is, the light part is between the mark and the surface of the water?

A. Yes; it is somewhat light there.

589. Q. And then there is an indication also along the edge of the water of the effect of wave action on the riprap to some extent, sort of a line there?

A. No; I can't say that is the effect of wave action. I don't doubt there has been some wave action, but I can't say from the mark.

59 590. Q. Isn't there a distinct indication of a wearing out there right on the upper line of that riprap?

A. No; I can't say so from the photograph. There may be some disturbance of the riprap from the water, but the photograph does not indicate it clearly.

591. Q. Then you and I just don't see right the same way, but that is for anyone to examine. In other words, you would expect to find some wearing out after a year or two of wave action on that riprap, wouldn't you?

A. Well, I would on bare soil. I wouldn't expect to find much of a nick cut in that riprap. Sometimes there are small particles of material in the riprap that might wash out.

592. Q. And the ice action would, of course, have the same effect?

A. The ice would have a different effect, if it had any.

593. Q. It would tend to wear out that riprap faster than it would ordinarily wear out if it was just exposed to the air?

A. If there was expansion of ice in the wintertime it might tend to force the riprap up.

594. Q. And would follow generally the level of the water along the bank there, is that right?

A. There is a very fine line there that shows the pool elevation.

60 In the Supreme Court of the United States

Office of the Clerk, Supreme Court U. S. Received Nov. 22, 1944.

Stipulation to print an abbreviated record

Filed Nov. 22, 1944

Petitioner in the above-entitled proceeding intends to rely only upon the following points set forth in its assignment of errors:

The Court of Claims erred:

1. In holding that there was a taking of respondent's property within the meaning of the Fifth Amendment, although there was neither a claim nor a finding of any invasion of respondent's fast lands.

2. In failing to hold that the raising by the Government of the water level of the St. Croix River above 672 feet mean sea level, which merely reduced the power which can be produced by re-

spondent's hydroelectric facilities using water emptying into such stream, did not constitute a taking of respondent's property within the meaning of the Fifth Amendment.

3. In failing to hold that the damage, if any, suffered by respondent as a result of raising the water level in the St. Croix River was consequential in nature, for which just compensation is not recoverable.

4. In holding in substance that respondent had a vested interest in the maintenance at its natural level of the water in a navigable stream

61 5. In failing to find that respondent's tailrace was an integral and essential part of its electric power plant and that it was located in the bed of the St. Croix River.

6. In failing to hold that such disposition of respondent's tailrace in the bed of a navigable stream subjected it to the consequences of any rise above the ordinary high water level of that stream resulting from any improvements of navigability.

* * * *

11. In entering judgment for respondent.

It is hereby stipulated by and between the parties hereto, by their respective counsel, that, in addition to those portions of the record printed for the purposes of the petition for certiorari and now designated as Volume I of the record, only those portions of the transcript of proceedings attached hereto need be printed, such additional material to comprise Volume II of the record. Nine copies of the following exhibits will be furnished the Court: Exhibits A, D-2, E-1, E-2, 7, 8, 22, 23, 24, after such copies have been approved by counsel for the parties as clear and faithful reproductions of the original exhibits.

It is further stipulated that those portions of the record to be omitted from the printed record may be referred to by either party, if deemed necessary, in the briefs or during the course of argument.

CHARLES FAHY,
Solicitor General,
Attorney for Petitioner.

JOHN WATTAWA,
Attorney for Respondent.

NOVEMBER 21, 1944.

[File endorsement omitted.]

AUG 1 1944

CHARLES ELMORE CROPLEY
CLERK

No. 312

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES, PETITIONER

v.

WILLOW RIVER POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 312

THE UNITED STATES, PETITIONER

v.

WILLOW RIVER POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the decision of the United States Court of Claims in the above-entitled case.

OPINION BELOW

The opinion of the Court of Claims (R. 21-25) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 7, 1944 (R. 32). The motion of the United States for a new trial and for amended and additional findings of fact was overruled May 1, 1944 (R. 32). The jurisdiction of this Court is invoked under section 3 of the Act of 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

The United States, in pursuance of a plan to improve navigation, erected a dam in the Mississippi River which raised the water level in the St. Croix River, a navigable tributary thereof. Respondent maintains a dam and hydroelectric plant at the mouth of the Willow River (a tributary of the St. Croix which the court below found to be non-navigable), so constructed as to draw water from the Willow River and discharge it directly into the St. Croix River. The effect of raising the level in the St. Croix was to reduce the operating head of water available to respondent for power production.

The question presented is whether the United States is liable for a reduction in respondent's available source of power resulting solely from an alteration in the flow of a navigable river.¹

STATEMENT

This is a suit brought by respondent in the Court of Claims to recover for property allegedly taken by the United States. That court gave judgment for respondent in the sum of \$25,000,

¹ Should certiorari be granted, we reserve the right to submit argument on the questions whether the finding that the ordinary high water level was 672 feet was based upon an erroneous test of "ordinary high water level;" whether in reaching it the court failed to give proper weight to the official records of the various stages of the river as shown by hydrographic gauges maintained by the United States Weather Bureau; and whether there was a lack of substantial evidence to support the finding.

with interest from August 12, 1938, at $4\frac{1}{2}\%$ per annum.

Respondent is a public utility company incorporated under the laws of Wisconsin (R. 19).^{*} It operates four hydroelectric power plants on the Willow River in Wisconsin, one of which is located at Hudson, Wisconsin, near the confluence of that river and the St. Croix River (R. 19, 20). The St. Croix River joins the Mississippi River at Prescott, Wisconsin, about fifteen miles below Hudson (R. 20). From Prescott to Stillwater, Minnesota, a point above Hudson, the St. Croix is in the form of a greatly elongated lake, and is often referred to as Lake St. Croix (R. 20). It is undisputed that the St. Croix between Hudson and Prescott, and the Mississippi River below Prescott, are navigable. The Court of Claims has found that the Willow River is not navigable.

The Court of Claims made no finding as to the location and construction of respondent's dam and power plant at Hudson, Wisconsin, other than its finding that the plant was located on land owned by respondent above ordinary high-water level near the confluence of the Willow and St. Croix Rivers (R. 19). The undisputed proof disclosed, however, the following facts:

^{*}The printed record contains the findings of the Court of Claims (R. 19-21). We have filed with this Court a motion to dispense with printing the transcript of testimony before the Court of Claims, and this has been filed with the Court in original form. Since the transcript is not printed, references to it are indicated by "Tr."

Respondent maintains a dam across the Willow River, first erected as a logging dam in 1886, approximately $\frac{1}{2}$ to $\frac{3}{4}$ mile above the natural confluence of the Willow River with the St. Croix River (Tr. 7, 19, 23-24, 35). This dam is equipped with a spillway, which has not been opened for many years (Tr. 18, 298), so that the natural bed of the Willow River below the dam is dry save to the extent that water is backed up into it from the St. Croix River (Tr. 298). For about $1\frac{1}{2}$ to 2 miles above this dam, the Willow River is broadened out into a lake, known as Lake Mallalieu (Tr. 29), which is for part of its length separated from the St. Croix River only by a narrow neck of land. About 500-600 feet above the old logging dam (Tr. 25), respondent cut a channel through this neck of land at a point where it was about 150 feet wide (Tr. 24), and placed in it a new dam, equipped with tainter gates for the release of water (Defendant's Exhibit 7). Adjacent to the dam, respondent constructed its power plant (Tr. 24); Defendant's Exhibit 8). In its operation water taken in from Lake Mallalieu flowed past the generators and was discharged directly into the St. Croix River (Tr. 9). The draft tubes carrying the water from the turbines discharge into a tailrace constructed by respondent in the bed of the St. Croix River and extending laterally from the power house wall about 34 feet into that river (Tr. 20,

152-153), the discharge ends of the draft tubes being carried below the surface of the river.²

The testimony is further without dispute that the operating head of a dam such as respondent's dam at Hudson, which with the amount of water flow determines the power output (Tr. 93-94), depends upon the extent to which the elevation of the head water at the entrance to the turbines is greater than the elevation of the water at the discharge end of the draft tubes (Tr. 43, 93). Hence it is agreed that the power production of the dam is affected by any fluctuation in the level of either Lake Mallalieu or the St. Croix River, and that any raising of the level of the St. Croix River at Hudson proportionately reduced the power head at respondent's dam.

On August 12, 1938, the United States, pursuant to the Act of January 21, 1927, 44 Stat. 1010, 1013, and supplementary legislation, completed a dam in the Mississippi River at Red Wing, Minnesota, a point about fifteen miles below Prescott, Wisconsin (R. 20). The dam is of the roller type of construction and may be so operated as to permit the release of any desired amount of water (Tr. 217). Since its construction, it has, with some exceptions (Tr. 355),

² That the discharge ends of the draft tubes were so placed is shown by testimony that at one time of extreme low water when the ends of the draft tubes came out of water, it was found necessary in order to secure good operation to extend them so that they would lead below the surface of the St. Croix River (Tr. 21).

been so operated as to raise the level of the St. Croix River to a height, at Hudson, Wisconsin, of 675.3 feet above mean sea level (R. 20). When the level exceeds 675 feet at Red Wing (approximately 675.3 at Hudson), the dam is rolled up and the river allowed to flow as in a state of nature (Tr. 218). The Court of Claims found that the ordinary high water level obtaining at Hudson before the construction of the Red Wing dam was 672 feet and that the United States had raised the level about 3 feet (R. 20). The head of water at respondent's dam, which had been 17 feet when the St. Croix River was at 672 feet (R. 21) and had reached a maximum of $22\frac{1}{2}$ feet at lower stages of the St. Croix (R. 20), was thus reduced by about 3 feet.

The Court of Claims determined that the value of the loss in power at respondent's hydro-electric plant resulting from this raising of the level of the St. Croix River was \$25,000 (R. 21). The total recovery allowed by the Court was \$25,000 with interest, and it made no finding of any injury to respondent other than this loss of water power. No contention is made that the raising of the water level of the St. Croix River caused any physical injury to respondent's power plant or any flooding of its fast lands, nor is it denied that the Red Wing dam was constructed in the exercise of the constitutional power of the United States to improve the navigability of the Mississippi and St. Croix, both navigable rivers.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that there was a taking of respondent's property within the meaning of the Fifth Amendment although there was neither a claim nor a finding of any invasion of respondent's fast lands.

(2) In failing to hold that the raising by the Government of the water level of the St. Croix River above 672 feet mean sea level, which merely reduced the power which can be produced by respondent's hydroelectric facilities using water emptying into such stream, did not constitute a taking of respondent's property within the meaning of the Fifth Amendment.

(3) In failing to hold that the damage, if any, suffered by respondent as a result of raising the water level in the St. Croix River was consequential in nature for which just compensation is not recoverable.

(4) In holding in substance that respondent had a vested interest in the maintenance at its natural level of the water in a navigable stream.

(5) In failing to find that respondent's tailrace was an integral and essential part of its electric power plant and that it was located in the bed of the St. Croix River.

(6) In failing to hold that such disposition of respondent's tailrace in the bed of a navigable stream subjected it to the consequences of any rise above the ordinary high water level of that

stream resulting from any improvements of navigability.

(7) In finding that the ordinary high water mark of the St. Croix River was 672 feet and not 676 feet above mean sea level.

(8) In giving controlling weight to the vegetation test in determining the ordinary high water mark when gauge readings were available.

(9) In failing to give proper weight to the official gauge readings in determining the ordinary high water mark of the St. Croix River.

(10) In holding that the Willow River was a non-navigable stream.

(11) In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

The Court of Claims, resting its decision on *United States v. Cress*, 243 U. S. 316, has held the Government liable in damages for impairment of the power potential of respondent's power plant located thirty miles upstream from the Government's dam found to have caused the injury. It has done so although none of respondent's fast lands were invaded, or its physical property taken or destroyed. In so holding, we submit that the court below has improperly extended the rule of *United States v. Cress*, and has in effect accorded to respondent a property right in the flow of a navigable river for whose taking the United States must pay compensation, contrary to the rule of *United States v. Chandler-Dunbar Co.*, 229 U. S. 53. We submit further that the

decision below demonstrates the need for a determination as to whether the *Cress* case retains vitality as an authority. As limited by *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 312 U. S. 592, the case rests upon a distinction between navigable and non-navigable waters which we think inadmissible, and in any event it is inconsistent with earlier and later decisions disallowing recovery for consequential damages.

1. The Court of Claims held that the United States is liable if it reduces the power head of water at a dam in a non-navigable stream. Accordingly, it held that the question here turned upon whether the Willow River was navigable. Finding that it was not, it thought the case was controlled by the decision in *United States v. Cress*. In this we submit that it erred.

The *Cress* case held the United States liable for the destruction of the power head at a mill-dam located in a non-navigable stream, the level of which below the dam had been raised as the result of the construction by the United States of a dam in a navigable stream.³ The basis of recovery was that the riparian owner had, under state law, a property right to have the water flow away from his land "as in the course of nature" (243 U. S. at

³ The opinion entitled *United States v. Cress* also deals with the companion case of *United States v. Kelly*, No. 718, and it is with the holding in the latter case (243 U. S. at 329-330) that we are here concerned.

330), which right, the Court concluded, the United States had taken by raising the water level of the nonnavigable stream.

But whatever may be the respective rights of the Government and a riparian owner in the natural flow of a non-navigable stream (see p. 12, *infra*), it is well settled that as against the paramount right of the Government to improve navigation "the flow of a navigable stream is in no sense private property". *United States v. Appalachian Power Co.*, 311 U. S. 377, at 424; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 69-70. Thus, compensation has been denied for impairment of the operating head of a dam in a navigable stream, *Barnes v. United States*, 46 C. Cls. 7; *Hood v. United States*, 46 C. Cls. 30; 49 C. Cls. 669; see *Coleman v. United States*, 181 Fed. 599, 601 (C. C. N. D. Ala.). The basis of these decisions is that the dam owner's "right to the use of the water" in a navigable stream "was not such a property right as entitled him to compensation" (46 C. Cls. at 29).⁴

Here the operating head at respondent's dam depends upon two factors, the level at the top of the dam of the Willow River, a non-navigable stream, and the level at its foot of the St. Croix

⁴ The power of the United States to improve navigation without liability to private owners is not limited to the removal of obstructions to navigation, *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 312 U. S. 592, 597.

River, a navigable stream (see p. 5, *supra*). The United States in no way injured whatever riparian rights respondent may have had in the flow of the Willow River. The undisputed testimony shows that the construction of the Government's dam at Red Wing affected the power output of respondent's plant, if at all, only by raising the level of the St. Croix River into which its draft tubes discharge (see pp. 4-5, *supra*). Respondent's claim is thus based on an asserted right to the flow, as in a state of nature, of a navigable river, the St. Croix. The Court of Claims assumed that respondent was entitled to recovery if the Willow River was non-navigable, even though it found (R. 20) that the Red Wing dam did not affect the level of the Willow River, but only that of the navigable St. Croix River. In allowing recovery, the Court of Claims in effect has held, contrary to *United States v. Chandler-Dunbar Co.*, *supra*, and later cases, that a riparian owner has as against the Government such a right to the flow of a navigable river as to entitle him to compensation. This holding, we submit, finds no support in *United States v. Cress*.

2. The opinion in *United States v. Cress*, *supra*, made no distinction between the rights of riparian owners along navigable and non-navigable streams (243 U. S., at 319). Its reasoning rested upon the broad principle that the power of the Government to improve navigation without liability is

"confined to the natural condition of the stream" (243 U. S., at 326), so that for any alteration of the natural flow of either a navigable or non-navigable stream the Government is liable. For this proposition the Court relied on *United States v. Lynah*, 188 U. S. 445, a case which in that aspect was overruled in *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 312 U. S. 592, 597. In the latter case the Court also distinguished and limited the *Cress* case, stating (p. 597):

What was said in the *Cress* case must be confined to the facts there disclosed. In that case, the Government's improvement in a navigable stream resulted in the flooding of the plaintiff's land in and adjacent to a non-navigable stream. The owners of the land along and under the bed of the stream were held entitled to compensation for the damage to their lands. The question here presented was not discussed in the opinion.

While the Court thus departed from the rationale of the *Cress* case, it found it unnecessary to overrule it since it was distinguishable on its facts.

If the holding in *United States v. Cress* retains current validity in the face of the *Chandler-Dunbar* and other cases, it rests upon a distinction between navigable and non-navigable waters. The power of the United States to regulate commerce by water extends to whatever control of the non-navigable watershed of a navigable river

is needed for improvement of the navigation down stream (*Oklahoma v. Atkinson Co.*, 213 U. S. 508, 523). The liability on the part of the United States for an improvement in a navigable river cannot reasonably be said to depend on whether the project affected by the rise in the water level is above or below the point at which the stream, or a tributary, becomes navigable. We submit that the relative rights of the United States and of riparian owners are the same irrespective of whether the latter's properties are located above or below an artificial line denominated the "head of navigation." A similar question was presented to this Court but not decided in *United States ex rel T. V. A. v. Powelson*, 319 U. S. 266, and we refer the Court to our briefs in that case for a fuller statement of our position.

There is a further ground, not presented in the *Powelson* and *Chandler-Dunbar* cases, upon which we submit that the *Cress* case and the decision below are in error. In the former two cases there was an admitted taking of fast lands by condemnation proceedings; the only question was what elements of value and of damage were to be recognized in those proceedings. Here, there is a loss of power potential somewhat impairing the usefulness of respondent's power plant. Such an injury is a consequential damage which does "not amount to a taking under the constitution" (*Gibson v. United States*, 166 U. S.

269, 273-274). The impairment of respondent's operating power head caused by the building of a dam thirty miles away, accompanied by no invasion or destruction of physical property, is no less consequential in nature than was the destruction of the value of a wharf by the removing of the river channel involved in *Gibson v. United States*, 166 U. S. 269; or the impairment of drainage by raising the water level involved in *Mills v. United States*, 46 Fed. 758 (S. D. Ga.) and *Lynn v. United States*, 110 F. (2d) 586 (C. C. A. 5); or the subjection of levees to a greater burden involved in *Bedford v. United States*, 192 U. S. 217; *Jackson v. United States*, 230 U. S. 1; *Franklin v. United States* 101 F. (2d) 459 (C. C. A. 6) (affirmed on other grounds, 308 U. S. 516), and *Ross Construction Co. v. Yearsley*, 103 F. (2d) 589 (C. C. A. 8) (affirmed on other grounds, 309 U. S. 18).⁵ In the *Gibson* case the Court quoted with approval as stating "the general rule upon the subject" a Pennsylvania

⁵ This Court has found that there is a taking where there is a permanent flooding of fast lands outside the bed of the river, or even permanent liability to intermittent but inevitably recurring overflows (*Pumpelly v. Green Bay Co.*, 13 Wall. 166; *United States v. Cress*, 243 U. S. 316; see *Sanguinetti v. United States*, 264 U. S. 146, 148-149; *Jacobs v. United States*, 290 U. S. 13, 16; *United States v. Sponenbarger*, 308 U. S. 256, 267). But it has recognized that these cases represent the "extremest qualification" of the rule that no recovery will be allowed for consequential damages, see *Transportation Co. v. Chicago*, 99 U. S. 635, 642; *United States v. Sponenbarger*, 308 U. S., at 265.

decision⁶ which held that the loss of waterhead through the backing up of a stream was "mere consequential damage." We submit that to the extent that *United States v. Cress* allowed recovery in such circumstances, it is inconsistent with this recognized principle.⁷

CONCLUSION

For the reasons stated, it is submitted that the petition for writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

AUGUST 1944.

⁶ *Monongahela Navigation Co. v. Coons*, 6 Watts & Searg. 101 (Pa. 1843).

⁷ This inconsistency between *United States v. Cress* and the cases cited on pages 13-14, *supra*, was recognized by the Circuit Court of Appeals for the Fifth Circuit in *Lynn v. United States*, 110 F. (2d) 586, 590, and for the Sixth Circuit in *Franklin v. United States*, 101 F. (2d) 459; both courts refused to follow the *Cress* case to the extent that it was there applicable.

FILED

JAN 11 1945

CHARLES CLAUDE DOWLEY
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No. 312

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES, PETITIONER

v.

WILLOW RIVER POWER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 312

UNITED STATES, PETITIONER

v.

WILLOW RIVER POWER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. I, 21-25) is reported in 101 C. Cls. 202.

JURISDICTION

The judgment of the Court of Claims was entered on February 7, 1944 (R. I, 32). The motion of the United States for a new trial and for amended and additional findings of fact was overruled May 1, 1944 (R. I, 32). The petition for a writ of certiorari was filed August 1, 1944 and granted October 9, 1944 (R. I, 34). The

jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

The United States erected a dam in the Mississippi River in pursuance of a plan to improve navigation, thereby raising the water level in the navigable St. Croix River and reducing the water power of respondent's dam and hydroelectric plant at the mouth of the Willow River (a non-navigable tributary of the St. Croix), which drew water from the Willow River and discharged it directly into the St. Croix River about 30 miles above the Government dam. The question is whether the United States is liable as for a taking of property.

STATEMENT

This is a suit brought by respondent in the Court of Claims to recover just compensation for the reduction in the generating capacity of a dam as property taken by the United States. That court gave judgment for respondent in the sum of \$25,000 with interest (R. I, 32).¹

¹ Only part of the record has been printed. The pleadings of the parties, the findings of fact, conclusion of law and opinion of the court below, together with related papers, comprise Vol. I of the printed record, hereinafter referred to as "R. I." Certain portions of the transcript of the testimony printed by stipulation form Vol. II, hereinafter referred to as "R. II." The exhibits filed with the Court are referred to simply by name and number.

Respondent is a public utility company incorporated under the laws of Wisconsin (R. I, 19). It owns and operates a dam and a hydro-electric power plant located at the confluence of two rivers at Hudson, Wisconsin (R. I, 17, 19): the St. Croix River, a concededly navigable waterway, and the Willow River, a non-navigable tributary of the St. Croix (R. I, 23). The St. Croix, at this point, resembles a greatly elongated lake and is often referred to as Lake St. Croix (R. I, 20). The undisputed proof discloses the following facts concerning the power plant and dam:

Respondent maintains a dam (not here involved) across the Willow River approximately $\frac{1}{2}$ to $\frac{3}{4}$ of a mile above the natural confluence of that river with the St. Croix (R. I, 12, 16; R. II, 36, 40; Ex. 7). The effect of this dam is to pool the waters of the Willow River and to raise them 22 feet above their normal elevation (R. I, 16-17), the resulting body of water being known as Lake Mallalieu (Ex. 7).² For part of its length, this body of water is separated only by a narrow neck of land from the St. Croix, which is at a considerably lower elevation at this point than the raised pool in the Willow River (R. II, 44-45).

² The dam was first erected as a logging dam in 1886 and was equipped with a spillway, but the spillway has not been opened for many years (R. II, 37) and the natural bed of the Willow River is now dry save to the extent that water is backed up into it from the St. Croix River.

In order to utilize the difference between the two levels of water for the production of power, respondent cut a channel through this narrow neck of land at a point where it was between 125 to 150 feet wide (R. II, 35, 40), and placed within it a dam and power house equipped with water wheels, turbines, generators and other necessary equipment for the generation of power (R. I, 17). Thus, instead of the waters of the St. Croix being separated from the Willow River by a strip of land, as formerly, the two rivers are now separated by respondent's dam and power house, whose foundations take the place of the natural bank (R. I, 4; R. II, 45-49; Exs. E-1, 22, 23, 24). Since this new outlet was made, the waters of the Willow River no longer empty into the St. Croix through the natural mouth of the river but flow through the artificial channel created by the respondent, first passing through the turbines in the power house where the mechanical energy produced by their fall is turned into electric energy. From the power house the water is discharged directly into the St. Croix River through draft tubes which carry below the surface of the latter.³ A guide wall projecting

³ That the discharge ends of the draft tubes were so placed is shown by testimony that at one time of extreme low water when the ends of the draft tubes came out of the water, it was found necessary in order to secure good operation to extend them so that they would lead below the surface of the St. Croix River (R. II, 39).

out from the side of the power house approximately 34 feet into the St. Croix River, and resting on the bed of that river, further aids in the channelization of the waters upon their discharge from the power house (R. II, 38, 46; Ex. 8).

It is undisputed that the power output of a dam such as respondent's is dependent upon the height of the operating head. The operating head is the difference between the elevation of the head waters at the entrance to the turbines, here the level of the Willow River, and the elevation of the tail waters at the discharge end of the draft tubes leading from the turbines, here the level of the St. Croix River (R. II, 41). The greater the difference, the greater the power output; hence, any raising of the level of the St. Croix River at Hudson (the tail water) proportionately reduces the power head at respondent's dam and consequently its potential power production (R. II, 44-45). Respondent's dam maintained the waters of the Willow River at this point at a fairly constant level of approximately 689 feet above mean sea level, so that there was comparatively little fluctuation in the level of the head waters to affect the operating head (R. II, 44-45; Exs. 1-5, 1-6). However, prior to August 12, 1938, the effective operating head of water at respondent's dam had varied between $22\frac{1}{2}$ feet and 8 feet with the normal fluctuations in the level of the St. Croix River (R. I, 4; R. II, 41).

On August 12, 1938, the United States, pursuant to an Act of Congress of January 21, 1927 (44 Stat. 1010, 1013), and supplemental legislation, completed a dam in the Mississippi River at Red Wing, Minnesota, approximately 30 miles below respondent's power plant (R. I, plate fol. p. 8). It is not denied that the Red Wing Dam was constructed in the exercise of the constitutional power of the United States to improve the navigability of the Mississippi and St. Croix, both navigable rivers. The dam is of the roller type of construction and may be so operated as to permit the release of any desired amount of water. Since its construction, its operation has, with some exceptions, raised the level of the St. Croix River at respondent's plant to a height of 675.3 feet above mean sea level. When the level exceeds 675 feet at Red Wing (approximately 675.3 at Hudson), the dam is rolled up and the river allowed to flow as in a state of nature (R. I, 10, 11, 20).

The Red Wing Dam, by preventing the St. Croix River from falling below 675 feet above mean sea level, makes 14 feet the maximum operating head obtainable at respondent's dam. In order to supply the resulting deficiency in the generating capacity of its dam, respondent entered into a contract to purchase electric current from the Northern States Power Company for resale. The transmission line built to carry the

purchased current cost \$21,000 (R. I, 21). Respondent thereupon brought suit in the Court of Claims to recover compensation for the reduction in the operating head of its dam from the 22.5 feet theretofore available at low water stages of the St. Croix River to 13½ feet, and for the consequent reduction in generating capacity (R. I, 4). At the trial of the cause, however, respondent limited its claim to compensation to the 3 feet by which the head had been diminished in raising the level of the St. Croix from 672 feet, ordinary high water mark according to respondent, to 675 feet. (See Brief in Opp. to Pet. for Cert., pp. 4-5.) The Court of Claims held that the Government "had a right to raise the level of the [St. Croix] river to ordinary high-water mark with impunity, but it is liable for the taking or deprivation of such property rights as may have resulted from raising the level beyond that point" (R. I, 23-24), and found that the Government had raised the level of the St. Croix River 3 feet above ordinary high water mark and that the value of the resulting loss of power was \$25,000 (R. I, 21). Judgment was entered for that amount, plus interest (R. I, 32).

SUMMARY OF ARGUMENT

I

A riparian owner has no property right as against the Government in the water power to be derived from the difference in level between a

non-navigable and a navigable stream. The Court of Claims erred, therefore, in awarding compensation to respondent for the loss of water power at its hydroelectric facilities caused by an alteration in the level of a navigable stream consequent upon the Government's improvement of navigation. Since respondent had no property right in the level of such a stream, it is immaterial to its right of recovery whether the alteration in its level extended up to or beyond ordinary high water mark.

United States v. Cress, 243 U. S. 316, is inapplicable because the claim there was based upon a change in the level of a non-navigable stream, whereas here the level only of the navigable river was raised. That case, if still law, would at most support the right of a riparian owner on a non-navigable stream to have the water of the stream flow from his land as in a state of nature; it does not conflict with the decisions of this Court which deny any such right to a riparian owner on a navigable stream. To grant compensation for the destruction of the generating power of respondent's plant by the Government's change in the level of a navigable stream would place respondent in a more favored position than the owners of structures erected in the bed of a navigable stream, which are uniformly held to be completely subject to the Government's power over navigation. Respondent employed the level of

the navigable stream, as other riparian owners employ the bed, at the risk of loss of its benefits.

II

Even if the Government's project be deemed to interfere with the flow of the Willow River, a nonnavigable tributary of the navigable St. Croix, the only interference is with the discharge of the former into the latter. To hold such interference compensable because of the nonnavigable character of the tributary, places a restriction upon the federal power to improve navigation which no case has thus far recognized. The *Cress* case, which involved such a situation, did not pass on this question, and the award of compensation made in that case was based upon a theory of rights in the level of even a navigable stream which was subsequently rejected by this Court in *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592. The federal power over navigation embraces not only the right to change the flow of a navigable river; but also whatever control of its nonnavigable tributaries or portions may be necessary for such purpose. Cf. *Oklahoma v. Atkinson Co.*, 313 U. S. 508; *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690. The paramount public interest in navigation does not begin at the head of navigation; it extends to the waters which feed

the navigable river. Hence the use of such waters immediately above, as well as below, the head of navigation should equally be subject to the power of the Government to diminish its value through an improvement in navigability.

III

In any event, the incidental impairment of the power potential of a dam 30 miles away from the Government's project is not a "taking" under the Fifth Amendment, but is mere consequential damage. To the extent that *United States v. Cress* allowed recovery in a parallel situation, it departed from the principles consistently given effect by this Court, under which compensation has been denied for damages at least as direct as the impairment of respondent's water power caused by the building of a distant Government dam. Cf., e. g., *Gibson v. United States*, 166 U. S. 269.

ARGUMENT

I

THE UNITED STATES IS NOT LIABLE FOR LOSS OF WATER POWER RESULTING FROM ITS RAISING THE LEVEL OF A NAVIGABLE STREAM

Respondent's claim rests on an impairment of the water power value of its dam caused by a rise in the level of the navigable St. Croix River as a result of a federal improvement in

that stream's navigability. A loss of value so dependent on the level of a navigable stream is not required to be compensated under the Fifth Amendment as a taking of private property.

It is well settled that there can be no private property rights in the flow of a navigable stream as against the paramount right of the United States to improve navigation. Thus while just compensation is properly payable for the flooding of fast lands as a result of navigational improvements in a navigable river, no compensation whatever will be awarded to the "riparian owners of the shore and appurtenant submerged lands" for the value of the "rapids and falls" and the consequent water power. *United States v. Chandler Dunbar Co.*, 229 U. S. 53. And in sustaining the power of the Federal Government to impose such conditions as it chose upon the privilege of erecting a dam in a navigable river, this Court has observed (*United States v. Appalachian Power Co.*, 311 U. S. 377, 424):

The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable." Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.

Application of these principles has resulted in the denial of compensation for the power site value of lands taken in condemnation proceedings on the ground that a riparian owner has no property right as against the United States in the use of the navigable waters, or the power inherent therein, or in the fall or flow of the water for commercial purposes. *Continental Land Co. v. United States*, 88 F. (2d) 104, 109 (C. C. A. 9), certiorari denied, 302 U. S. 715; *Washington Water Power Co. v. United States*, 135 F. (2d) 541, 543 (C. C. A. 9), certiorari denied, 320 U. S. 747. Compensation has likewise been refused for the impairment of the operating head of a dam in a navigable stream. *Barnes v. United States*, 46 C. Cls. 7; *Hood v. United States*, 46 C. Cls. 30, 49 C. Cls. 669; see *Coleman v. United States*, 181 Fed. 599, 601 (C. C. N. D. Ala.).

Mereover, compensation has repeatedly been denied for damage which is more material than the loss of water power, such as the destruction of privately owned levees and the recurrent flooding of private land due to the construction of levees by the Government which confined the waters of the Mississippi and raised their level (*Jackson v. United States*, 230 U. S. 1; *Hughes v. United States*, 230 U. S. 24; *Cubbins v. Mississippi River Commission*, 241 U. S. 351; *Franklin v. United States*, 101 F. (2d) 459 (C. C. A. 6), affirmed on other grounds, 308 U. S. 516);

erosion of land bordering the Mississippi caused by revetments built by the Government for the purpose of stabilizing the channel (*Bedford v. United States*, 192 U. S. 217); interfering with a riparian owner's access to land by concentrating the flow of a river with the aid of a dyke (*Gibson v. United States*, 166 U. S. 269); impairing the drainage of lands by changing the flow of a river into which they drain (*Mills v. United States*, 46 Fed. 738 (S. D. Ga.); *Lynn v. United States*, 110 F. (2d) 586 (C. C. A. 5)); and increasing the likelihood of intermittent flooding by altering the level or natural flow of a stream (*Christman v. United States*, 74 F. (2d) 112 (C. C. A. 7); *Walls v. United States*, 44 C. Cls. 482; *Tompkins v. United States*, 45 C. Cls. 66).

This body of authority is fatal to respondent's asserted right to have the waters of the St. Croix flow away from its lands at a height no greater than ordinary high water. Since respondent has no property right in the flow of the St. Croix as against the paramount power of the Government, it is immaterial whether the alteration in such flow extended up to, or beyond, ordinary high water mark. The significance of ordinary high water mark is that it bounds the bed of the river; land situated above ordinary high water mark is fast land, for whose invasion compensation must be paid, while land situated below is subject to the dominant power of the Federal Government and no compensation need be paid

for its flooding. *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592; *Willink v. United States*, 240 U. S. 572, 580; *United States v. Meyer*, 113 F. (2d) 387, 398 (C. C. A. 7), certiorari denied, 311 U. S. 707; *Marrett v. United States*, 82 C. Cls. 1, 13, certiorari denied, 299 U. S. 545; *Barr v. Spalding*, 46 F. (2d) 798, 800 (W. D. Ky.). But ordinary high water mark has no relevancy where the damages complained of are changes in the flow of the river, not the flooding of land.⁴ Unlike fast land, the flow of the river is at all times subject to the servitude in respect of navigation created by the Constitution in favor of the Federal Government. See *Scranton v. Wheeler*, 179 U. S. 141, 163.

⁴ Here respondent made no claim in its petition in the court below that raising of the water level of the St. Croix River flooded its fast lands or caused any physical injury to its power plant (R. I, 3-8), and while the respondent's reply alleged that it had been ousted from the use and enjoyment of fast lands (R. I, 18), no proof whatever was submitted on this point. The court below made no finding that there was any invasion of fast lands or any injury to respondent's property, other than the loss of water power, and the judgment is predicated entirely upon the loss in water power. It is true that an increase in the level of the St. Croix River necessarily raises the water along the banks on both sides, but it does not follow that there was resulting injury to physical property. Indeed, the evidence shows that respondent's plant had been constructed so that it could be operated even when the St. Croix was at a level of 681 feet above mean sea level (R. II, 41). Thus the government in stabilizing the level permanently at 675 feet did not interfere with the operation of the power plant.

Therefore, regardless of the extent in the alteration of such flow, whether extending above or below ordinary high water mark (cf. *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592), there can be no liability predicated on such interference alone. Compensation is due only for whatever damages may be done property not subject to any servitude in the interest of navigation, such as fast land (*United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 60; *Continental Land Co. v. United States*, 88 F. (2d) 104 (C. C. A. 9), certiorari denied, 302 U. S. 715), or structures erected above high water. *Hood v. United States*, 49 C. Cls. 669, 680.⁵

Under these decisions, respondent plainly had no property rights in the flow of the navigable St. Croix, as against the Federal Government's constitutional powers to improve navigation, which would sustain an award of compensation for the loss in water power due to the alteration in the river's level. But the Court of Claims dis-

⁵ Intangible riparian rights such as the right to the flow of a stream in its natural condition, or the right to subsurface drainage (*United States v. Meyer*, 113 F. (2d) 387 (C. C. A. 7); *Lynn v. United States*, 110 F. (2d) 586 (C. C. A. 5)) or the right of access to the waters (*Scranton v. Wheeler*, 179 U. S. 141; *Gibson v. United States*, 166 U. S. 269), are subject to the same servitude in the interests of navigation of the stream as is the bed of the stream, and nothing is due for their impairment by the United States in the exercise of its paramount authority.

regarded these authorities, stating that it had "no option but to follow" *United States v. Cress*, 243 U. S. 316, because "the facts of that case * * * are identical with the facts here" (R. I, 25). This ~~overlooked a~~ crucial distinction between the cases: the claim in the *Cress* case^{*} was based upon the rise in the level of a non-navigable stream, whereas the instant claim relates to the raising of a navigable river.

As here, the plaintiff in the *Cress* case owned a dam located in a non-navigable tributary of a navigable waterway (the Kentucky River). Also as here, the Government constructed a dam in the navigable stream. But there, the Government's dam raised the level of the *non-navigable* tributary below petitioner's dam to such a level as to deprive the plaintiff's dam of all value as a source of power. This Court held the United States liable for the depreciation in the value of the mill property as a result of the destruction of the water power. The basis of recovery was that under the laws of Kentucky, the riparian owner owned the bed of the stream and had "as an inseparable part of the land" the "right to have the water flow away from the mill dam unobstructed, except as in the course of nature."

^{*} The opinion entitled "*United States v. Cress*" also deals with the companion case of *United States v. Kelly*, No. 718, and it is with the holding in the latter case (243 U. S. at 329-330) that we are here concerned.

A destruction of this right by raising the water level of the non-navigable stream was held to be "a taking of a part of the land" (243 U. S. at 330). Here, however, the diminution in the generating capacity of respondent's plant is due solely to the rise in the level of the navigable St. Croix River into which the draft tubes discharge (see pp. 4-7, *supra*), and the Court of Claims expressly found that the levels of the non-navigable Willow River had not been affected by the Red Wing Dam (Plg. 5, R. I, 20).¹ The right to compensation for interference with the flow of a non-navigable stream because the riparian owner had a right to have the waters flow from his land as in a state of nature, upheld in the *Cress* case, constitutes no authority for such a right in the flow of a navigable river where the flow of the non-navigable stream is not altered. This is in-

¹ The court below referred to the water level of the St. Croix River as "raised and backed up into plaintiff's tailrace" (R. I. 22). It is clear, however, that this did not imply a raising of the level in anything but the St. Croix River. This is to be seen from the specific finding that the Red Wing Dam "did not affect the levels of Willow River" (R. I, 20), and the evidence showing that the dam and power house form part of the banks of the St. Croix, replacing the natural bank of land excavated by respondent (see p. 4, *supra*). The tailrace of the plant is the St. Croix River itself, the guide wall which defines such tailrace resting on the bed of the St. Croix. If the level of such tailrace has been raised, it is because it is part of the St. Croix, and when the level of the latter was raised, the level of the tailrace rose with it.

deed implicitly recognized by the decision below, holding the government liable only to the extent that it raised the level of the St. Croix above its ordinary high-water level, and indicating that the government would have incurred no liability if its interference with the natural flow had stopped at ordinary high water mark (R. I, 23-24). If respondent was entitled to the flow of the St. Croix as in a state of nature, as was the plaintiff in the *Cress* case, the government would be liable for all the damage consequent upon changing that flow from what it previously was.

Moreover, the *Cress* case was based on the absolute right of the riparian owner under Kentucky law to have the water of a nonnavigable stream flow from his land as in a state of nature.⁸ Under the laws of Kentucky (*Barr v. Spalding*, 46 F. (2d) 798, 799 (W. D. Ky.)), as well as of Wisconsin (*Fox River Paper Co. v. R. R. Comm.*, 274 U. S. 651) no such unqualified property right inheres in the owner of property bordering a navigable river. Such owner takes subject to "the right of the public to regulate, control and direct the flow" of the stream in the interest of navigation. *Wisconsin River Improvement Co.*

⁸ "Under the law of Kentucky, ownership of the bed of the creek, subject only to the natural flow of the water, is recognized as fully as ownership of the mill itself" and includes "the right to have the water flow away from the mill dam unobstructed." *United States v. Cress*, 243 U. S. 316, 330.

v. *Lyons*, 30 Wis. 61, 65; *S. S. Kresge Co. v. Railroad Commission*, 204 Wis. 479. Since his rights are subject to the public easement or servitude of navigation, he cannot complain of interference with the use of his water and the diminution of the water power derived therefrom by a dam whose construction is authorized by the state. *Falls Mfg. Co. v. Oconto River Improvement Co.*, 87 Wis. 134. Accord: *Rundel v. Delaware & Raritan Canal Co.*, 14 How. 80. Respondent, therefore, does not have the unqualified right under state law upon which the *Cress* case based the award of compensation.

There is an even more cogent reason for the inapplicability of the *Cress* case here. There, the plaintiff's mill, dam, and other equipment were located entirely within a non-navigable stream, and the power potential depended solely upon the flow of that stream. Here, however, respondent has deliberately made the power potential of his plant dependent upon the maintenance of the level of the navigable St. Croix. By diverting the waters of the Willow River from their natural bed, raising them to an artificial height, and then emptying them into the St. Croix at a lower level through a manufactured outlet, respondent created a source of power which derived its energy from the difference between the level of the impounded waters of the Willow River and the natural level

of the St. Croix. By thus incorporating the water level of a navigable stream into the design of its plant, the respondent assumed the risk, as do all riparian users of the flow of a navigable stream, that the Government, pursuant to its dominant power over such streams, might impair the use of the stream. *United States v. Chandler-Dunbar Co.*, 229 U. S. 53; *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251; *Union Bridge Co. v. United States*, 204 U. S. 364, 400.

The situation would seem to be at least as unfavorable to respondent's claim as that involved where structures are placed in the bed of a navigable stream. Respondent is not seeking to recover for the damage done to the physical structures which it constructed on the bed of the Willow and St. Croix Rivers,⁹ but is seeking compensation for loss of the intangible force generated by equipment which includes those structures,—a force which is the product of the difference in levels between water respondent has pooled and the level of a navigable stream. The owners of structures in the bed of a navigable

⁹ The evidence shows that a guide wall which channelizes the discharge of waters from the power plant was built by respondent out into the St. Croix a short distance and rested on the bed of the stream; that the foundations of the power house likewise rested on the bed of the stream; and that the draft tubes which conduct the water out of the turbines extended out into the channel of the St. Croix and were below high watermark. (See pp. 4-5, *supra*.)

river cannot recover for damage done them in the improvement of navigation. *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251; *Willink v. United States*, 240 U. S. 572; *Delaware R. Co. v. Weeks*, 293 Fed. 114, 120; cf. *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82, 89. This is so even where the level of the stream is raised several feet above its high water mark, and compensation is not recoverable for the damage done a structure resting on the bed of the river whether such damage results from raising the level of the stream up to high water mark or from raising it above that level. *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592. It would seem to follow that by incorporating the navigable stream itself into the design of its power plant, as an integral part thereof, respondent took the risk that the power, made dependent upon the level of a navigable waterway, "may be injured or destroyed without compensation by a federal improvement of navigable capacity." *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592, 599. Indeed, if those who employ only the bed of a navigable stream, which is capable of limited ownership,¹⁰ do so at the risk of the loss of their

¹⁰ *Yates v. Milwaukee*, 10 Wall. 497; *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592, 595; *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82, 87.

property, it would seem to follow *a fortiori* that they also assume such risk who employ the navigable stream itself, incapable as it is of being privately owned (*United States v. Chandler-Dunbar Co.*, 229 U. S. 53).

II

A CHANGE IN THE LEVEL OF A NON-NAVIGABLE TRIBUTARY OF A NAVIGABLE RIVER AS A CONSEQUENCE OF AN IMPROVEMENT IN NAVIGATION DOES NOT IMPAIR A COMPENSABLE INTEREST

We have thus far undertaken to show that the Government's improvement of navigation in the Mississippi River physically affected only the waters of navigable streams, *i. e.*, the Mississippi and the St. Croix Rivers; and that there was no physical interference with the waters of the non-navigable Willow River. The court below, however, thought the *Cross* case squarely applicable because the facts were identical, and in that case the Court granted compensation for interference with "the right to have the water [of a non-navigable stream] flow away from the mill dam unobstructed, except as in the course of nature * * *" (243 U. S. at 330). However, if that "right" is to be recognized in the instant case, it would amount to a right in the respondent to have the waters of the non-navigable Willow River flow "as in the course of nature" into the navigable St. Croix—in short, a property right

in the St. Croix itself, since any alteration in the flow or level of the latter would affect the discharge into it of the waters of the Willow River. Such a property right in a navigable stream is denied by all the decisions, to which we have already referred.

But if it be assumed that the raising of the St. Croix constituted an interference with the non-navigable Willow River, and that the power potential of respondent's dam depended entirely on the flow of that river, it is submitted that no compensable interest has been destroyed.

This Court has recognized that the federal power to improve navigation not only includes the right to change the flow of a navigable river, but also extends to such control of its non-navigable tributaries or portions as may be necessary for such purpose. *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690; *Oklahoma v. Atkinson*, 313 U. S. 508; *United States v. Utah*, 283 U. S. 64. And while there may be a distinction between the powers of the Federal Government over the non-navigable reaches of a navigable river and its navigable portions (*United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U. S. 266, 273), no right to compensation has ever been based upon such a distinction. Nor is *United States v. Cress*, 243 U. S. 316, an exception to that statement.

In the *Cress* case, the Government, resisting the payment of compensation for the flooding of lands and the decrease in water power resulting from the raising of a non-navigable stream, contended that control of a navigable river included within it control of its tributaries and carried with it the right to raise the water in the tributary streams (243 U. S. at 319). This Court expressly declined to pass upon that contention, but assumed that the rights of riparian owners on a non-navigable tributary were no greater than upon navigable waters, and on this assumption the Court concluded that the Government was liable for any alteration in the natural flow of the navigable waters (243 U. S. at 319). Insofar as the *Cress* case held that the public right in a navigable river was limited "to the natural state of the stream" (243 U. S. at 325), it has been overruled by *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592.

In the latter case, the Government, for the purpose of improving navigation, raised the water level in a navigable stream about 7 feet above ordinary high water mark, thereby flooding embankments which the railroad company had constructed in the stream between ordinary high and ordinary low water marks, and which concededly did not constitute an obstruction to navigation. In a suit for compensation for the damage to the embankments, this Court rejected the railroad's

contention "that the power of the Government to take private lands for the improvement of navigation is confined to the natural widths, levels, and flows of the river and that if more is taken compensation must be made" (312 U. S. at 595). The *Cress* case, the Court stated (312 U. S. at 597):

* * * must be confined to the facts there disclosed. In that case, the Government's improvement in a navigable stream resulted in the flooding of the plaintiff's land in and adjacent to a non-navigable stream. The owners of the land along and under the bed of the stream were held entitled to compensation for the damage to their lands. The question here presented was not discussed in the opinion.

While the Court found it unnecessary to overrule the *Cress* case because it was factually distinguishable, it clearly departed from the rationale of that case. As limited by this decision, the *Cress* case is authoritative only insofar as it recognizes a right in the owners of land bordering the nonnavigable tributary of a navigable river to compensation for the flooding of such lands by an improvement in the main stream. Of doubtful authority at present is so much of that case as admits a right in such an owner to have the nonnavigable waters flow from his land as in a state of nature, despite the needs of the Government's project for the improvement of naviga-

tion in the main stream.¹¹ That no such right exists in the owner of land bordering a navigable river can now be considered settled beyond dispute. See cases, pp. 11-13, *supra*. Considerations identical to those which impelled these decisions require the denial of such right to a riparian owner on the nonnavigable tributaries of a navigable river.

The paramount public interest in navigability, to which the owner of land bordering a navigable stream must yield his right to the flow of the river as in a state of nature, does not begin at the head of navigation. It extends back to the source of the waters which feed the river. Because of the indivisible relationship between the flow above the head of navigation and the state of navigability below, the power of the Federal Government to regulate commerce carries with it the right to control the non-navigable watershed of a navigable river (*Oklahoma v. Atkinson Co.*, 313 U. S. 508, 523; *United States v. Utah*,

¹¹ For the proposition that the power of the Federal Government to improve the navigability of a river without liability to riparian owners is confined to its natural condition, the Court in the *Cress* case relied on *Monongahela Navigation Co. v. United States*, 148 U. S. 312, which has been explained in *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82, 89, as resting upon an estoppel arising out of its peculiar facts, and on *United States v. Lynah*, 188 U. S. 445, a case which in that aspect was expressly overruled in *United States v. Chicago, Milwaukee, St. Paul & Pac. R. R. Co.*, 312 U. S. 592, 597.

283 U. S. 64, 90), and prohibit any use of it which is detrimental to navigation. *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690, 709-710. The public interest in navigation imposes a servitude upon private rights in a *navigable* river so that the flow of the stream can be altered or destroyed without entitling the owner to compensation (*United States v. Chandler-Dunbar Co.*, 229 U. S. 53; see pp. 11-13, *supra*). The same public interest in navigation, from which stems the power of the Federal Government over the waters of the *nonnavigable* tributaries of navigable rivers, justifies the imposition of a like servitude upon the flow of such tributaries, superseding any private rights therein. The title to such tributary waters and to their flow can be only a "qualified title," subordinate to the powers of the Government to improve navigation; hence, the impairment of the value of those private rights through an improvement in navigation is not a taking of property but only "the exercise of a power to which that property has always been subject." (Cf. *United States v. Chicago, Milwaukee, St. Paul & Pac. Railroad Co.*, 312 U. S. 592, 597; *Scranton v. Wheeler*, 179 U. S. 141, 163.) Just as the Federal Government may prohibit without liability such use of the upper waters of a navigable stream as will adversely affect navigation below (*United States v. Rio Grande Irrigation Co.*, *supra*), so should it be

able without liability to diminish the value of the use made of such waters, by virtue of the incompatibility of such use with an improvement in navigability below.¹²

III

THE IMPAIRMENT OF THE POWER HEAD OF RESPONDENT'S DAM IS A CONSEQUENTIAL INJURY AND NOT A TAKING WITHIN THE FIFTH AMENDMENT

Even if it be assumed that the use made of the flow of a stream is a property right paramount to the Government's powers over navigation, insofar as the right to compensation is concerned, the court below improperly awarded compensation because the incidental impairment of the power potential of a dam is not a "taking" under the Fifth Amendment. The only authority for the holding below in this aspect is *United States v. Cress*, 243 U. S. 316, which, it is respectfully submitted, is an anomalous decision, departing from the principles to which this Court has otherwise consistently adhered.

¹² The question here discussed is different from that reserved in *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U. S. 266, *i. e.*, whether compensation for an actual taking of property on a nonnavigable stream should include power-site value despite the latent authority of the Government to forbid such projects. Here there is no actual taking, and the question relates to the effect of the present exercise of the Government's authority in a navigable stream itself.

To avoid the hardship which would follow from restricting the right to compensation under the Fifth Amendment to a "taking" which involves acquisition by the Government, this Court has found a "taking" where there is a permanent flooding of fast lands outside the bed of the river, or even permanent liability to intermittent but inevitably recurring overflows (*Pumpelly v. Green Bay Co.*, 13 Wall. 166; *United States v. Cress*, 243 U. S. 316; see *Sanguinetti v. United States*, 264 U. S. 146, 148-149; *Jacobs v. United States*, 290 U. S. 13, 16; *United States v. Sponenbarger*, 308 U. S. 256, 267). But it has recognized that these cases represent the "extremest qualification" of the rule that no recovery will be allowed for consequential damages. See *Transportation Co. v. Chicago*, 99 U. S. 635, 642; *United States v. Sponenbarger*, 308 U. S. at 265. Both the decision below and the *Cress* case go beyond these decisions in finding a "taking" in the impairment of the generating capacity of a dam through a change in the level of the waters of the tailrace. In the inundation of uplands there may justifiably be found an implied promise to pay for the value of the damaged lands, but no parallel reasoning will raise an implied promise to pay for the loss in the power potential of a dam by raising the water level of a navigable stream at a point miles away.

The impairment of respondent's operating power head caused by the building of a dam

thirty miles away would seem to be no less consequential in nature than the destruction of the value of a wharf by removing the river channel (*Gibson v. United States*, 166 U. S. 269); or injury to a riparian owner's right of access through erection of a pier (*Scranton v. Wheeler*, 179 U. S. 141); or impairment of drainage by raising the water level (*Mills v. United States*, 46 Fed. 738 (S. D. Ga.); *Lynn v. United States*, 110 F. (2d) 586 (C. C. A. 5); *United States v. Meyer*, 113 F. (2d) 387 (C. C. A. 7)); or subjection of levees to a greater burden (*Bedford v. United States*, 192 U. S. 217; *Jackson v. United States*, 230 U. S. 1; *Franklin v. United States*, 101 F. (2d) 459 (C. C. A. 6), affirmed on other grounds, 308 U. S. 516; *Ross Construction Co. v. Yearsley*, 103 F. (2d) 589 (C. C. A. 8), affirmed on other grounds, 309 U. S. 18); or destruction of the value of a coal tippie rendered useless by raising the level of a stream (*Kelley's Creek & Northwestern R. R. Co. v. United States*, 100 C. Cls. 396). In the *Gibson* case this Court quoted with approval as stating "the general rule upon the subject" a Pennsylvania decision (*Monongahela Navigation Co. v. Coons*, 6 Watts & Searg. 101 (Pa. 1843)) which held that the loss of waterhead through the backing up of a stream was "mere consequential damage." See also *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251; *Kokuk & Hamilton Bridge Co. v. United States*, 260 U. S. 125.

All these cases involved damage certainly more tangible and no further removed from the cause of the loss than the damage complained of at bar. To the extent that *United States v. Cress* allowed recovery for the destruction of the power potential of a dam through a rise in the level of a stream, it departed from the principles to which these cases give effect and is inconsistent with them. These principles, from which *United States v. Cress* is the only deviation, compel the conclusion, it is submitted, that the impairment of the flow of a tributary stream consequent upon a lawful change by the Government in the flow is not a compensable "taking" under the Fifth Amendment. *Gibson v. United States*, 166 U. S. 269; *Bedford v. United States*, 192 U. S. 217.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

CHARLES FAHY,
Solicitor General.

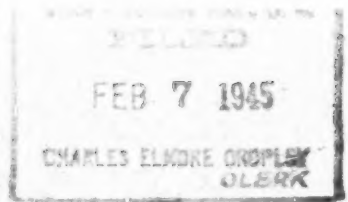
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JANUARY 1945.

FILE COPY



No. 312

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES, PETITIONER

v.

WILLOW RIVER POWER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY MEMORANDUM FOR THE UNITED STATES

✓
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REPLY MEMORANDUM FOR THE UNITED STATES

The decision below awarded compensation to respondent for the decrease in power capacity of its dam resulting from the raising of the level of the navigable St. Croix River by three feet, thus reducing by that amount the difference in level between the Willow River, on the upstream side of respondent's dam, and the St. Croix, into which the waters are discharged. The court found specifically that there was no change in the level of the Willow River (R. 20-21). The decision was based on the supposed rule that the United States is liable for any deprivation of property rights resulting from the raising of the level of a navigable stream above the ordinary high water mark (R. 23-24). The Government's main brief

is directed principally to showing the error, as we conceive it, of this basis of the court's decision. The Government's brief pointed out that, while the compensation awarded was not based on any taking of property through the flooding of fast land, it was to be observed that portions of the respondent's structure rested below high water mark and indeed on the bed of the navigable St. Croix (Govt. Br. p.20).

The brief of respondent is based largely on the argument that the damages "were the result of a taking of respondent's fast lands which included part of the dam and generating facilities" (Resp. Br. p. 13 *et seq.*). Respondent charges that the Government, in pointing out that portions of the structure lie below high water mark in the St. Croix, has changed its position in this Court. It is asserted (p. 14) that the Government changed its position "only after this appeal was taken but it supports the claim only by asserting two insignificant parts of the dam were located in the St. Croix River, one, the draft tubes and two, a guide wall." It is also charged that "The record also shows clearly that no findings were requested on any issue claimed material now." (p. 8).

Without magnifying the issue, we wish to make it plain that our position with respect to the location of portions of respondent's structure was brought forward in the court below and supported by the same evidence to which we have referred in our principal brief in this Court.

With respect to requested findings, the record in this Court could not show whether the requests were or were not made, since the Court of Claims declined to certify as part of the record the report of the commissioner, the defendant's exceptions and requests, and the defendant's motion for a new trial and for amended and additional findings of fact (see Order of Court settling record, R. I, 33). The record in the Court of Claims shows clearly, however, that the pertinent requests were made at the appropriate times. Upon the filing of the commissioner's report, the Government in its exceptions stated: "The findings likewise fail to describe plaintiff's St. Croix hydroelectric plant at Hudson in its relation to the bed of Lake St. Croix, a navigable interstate waterway of the United States." (Designated Portions of Transcript of Testimony, p. 273.) The Government requested this additional finding (*id.* p. 277): "The west side of the powerhouse proper and the concrete guide wall or tail race flume, which latter extends out into Lake St. Croix for a distance of 34 feet westward, rest upon foundations constructed in the Lake bed to elevations below 663 feet, mean sea level (Shultz, Tr. 20, 44-45; Hooper, 389-391)."¹ Thereafter, upon the entry of findings of fact by the court itself, the Government filed this exception (*id.* p. 293):

¹ The citations to the transcript are now to be found in the printed record at R. II, 38-39, 45-46.

The uncontradicted evidence shows that the powerhouse is located near the confluence of the two rivers, and is designated by plaintiff as the "St. Croix plant" (it being the one in controversy in this suit). It abuts upon the St. Croix River, its west elevation or side being continuous with and forming an integral part of the eastern bank of that river. The evidence further shows that that part of the powerhouse comprising the tail race extends out into the St. Croix River for a distance of 34 feet, the concrete tail race guide walls thereof resting upon foundations constructed in the bed of that river down to elevations below 663 feet mean sea level, that is to say 9 feet below the ordinary high water line of 672 feet as found by the court in Finding 5 (Hooper, Tr. 389-391; drawings B and C appended hereto; see also Deft's Exhibits 7 and 8).

An additional finding was requested in substantially these terms (*id.* p. 295).

The evidence itself is uncontradicted and indeed is in large part the same evidence upon which respondents rely in maintaining that there has been a flooding of part of the structure. Exhibits 22 and 23, to which respondent makes special reference (Br. pp. 6, 15, 17), show that to whatever extent the St. Croix has been raised in contact with the structure, the contact is with the portion which rests on the bed of the St. Croix itself. It does not avail the respondent to

speak of the draft tube and guide wall as "two insignificant parts of the dam" (p. 14), for it is to these parts that respondent points (Exs. 22 and 23) in maintaining that contact with its dam has been increased by a height of three feet through the raising of the level of the St. Croix. It may also be remarked that in a further sense these are not insignificant, since the testimony shows that "good operation" required the draft tubes to be submerged, even when the level of the St. Croix was unusually low and the head correspondingly great. (R. II, 39.)² If respondent's claim

² While the record thus adequately indicates the necessity of keeping the draft tubes below water level in the lower pool, it may be of interest to note the scientific explanation of this:

The invention of the draft tube about 1840 greatly increased the possibility of adapting the pressure turbine to suit local conditions. This consists in arranging the discharge pipe so that its lower end always discharges below the surface level in the tail race. By this means the turbine may be elevated above tail-race level without loss of head, for since (neglecting the kinetic head in the tube) the pressure in the draft tube at tail-race level is equal to that of the atmosphere, if the diameter is uniform that at the top of the tube will be less than atmospheric by an amount equivalent to the difference of level between turbine and tail race. The available head, measured from head water to the discharge side of the turbine, is thus the same as if the turbine were erected at tail-water level and discharged under atmospheric pressure. (A. H. Gibson, *Hydraulics and Its Applications* (Fourth Edition, 1934), p. 463.) See also article "Turbines" in *Encyclopedia Britannica*, Fourteenth Edition, Volume 22, p. 581.

is based on physical flooding, its claim is thus self-defeating, for the United States may without compensation subject to flooding above high water mark structures which rest below that level in a navigable stream. (*United States v. Chicago, Milwaukee, St. Paul, and Pacific R. R. Co.*, 312 U. S. 592.)

Respectfully submitted.

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PAUL A. FREUND,
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FEBRUARY 1945.

FILE COPY

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 312

THE UNITED STATES, PETITIONER

v.

WILLOW RIVER POWER COMPANY

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

R. M. RIESER,
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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

This writ of certiorari is proposed by the defendant in the court below (petitioner herein) to review a judgment entered against the United States for Twenty Five Thousand Dollars (\$25,000). These damages were fixed for the taking by the government of that part of a dam owned by the plaintiff in the court below (respondent here). The damages recovered are for only part of the dam taken above ordinary high water mark. The judgment is based upon special findings (Tr. 19-21) and an opinion (Tr. 21-25) which cover in detail the process by which the Court of Claims arrived at its conclusions. Eleven errors are assigned (p. 7-8). All of them reflect the unwillingness of the

government to accept the Court of Claims' findings on disputed issues of fact or disagreement with the Court's findings as supported by the undisputed proof. (Herein reference to the "Printed Transcript of the Record" will be made as (Tr. ----), to the remainder of the record as yet not printed as (R. ----), and to the petition for writ of certiorari as (P. ----), in each case followed by the page number referred to. For convenience of reference and to make sure that the parts referred to are properly identified, we reproduce the principal oral evidence relied upon in this brief as an appendix. This procedure is deemed necessary because the record is somewhat involved as a result of the failure of the petitioner to include a vast amount of material parts in its request for the record to be included herein, thereby compelling respondent to supply such parts by an independent designation. The result is that part of the evidence to be relied upon appears in petitioner's designation, and the remainder in the respondent's designation.)

The single ground urged why this writ should be allowed is urged upon unsupported assertions of what the facts show and erroneous theories of the import of the cases relied upon

To support the "reasons for granting the writ", (P. 8), the statement is made that the Court of Claims held the government liable for damages for impairment of the power potential of respondent's power plant. Then it is said that "it (the Court of Claims) has done so although none of the respondent's fast lands were invaded, or its physical property taken or destroyed".

Petitioner has not read either the record or the decision carefully. The claim for damages was founded and the court allowed damages for taking of approximately three feet of head of respondent's dam (Tr. 20, Par. 5) and similar areas of plaintiff's

land on either side of the tailrace and power house and gates of the dam. (Exh. 22 & 23, Witness Eckberg R. 238 and 430-431, Exh. D-2, Exh. E-1, E-2, E-3. Note particularly the difference between water levels in Exh. D-2 and Exh. E-1, E-2, E-3, and Exh. 22 & 23, and the areas of land affected as shown by this comparison. The appendix assembles and explains the evidence in detail.) The value of plaintiff's enterprise was reflected by the principal use of the water power, that is, generating capacity. Plaintiff's loss was measured by the cost of reproducing the cheapest available substitute. (Tr. 25) The record demonstrates what is apparent from anyone's knowledge of the use of water.

It seeks its level. When the level was raised three feet above ordinary high water mark, the water spread to the height of three feet through plaintiff's turbines and hydraulic equipment, and likewise raised to an equal height along the fast land leading to the dam along both ends of the power house and spillway. (Exh. 22, 23, Eckberg R. 238 and 430-431. Schultz R. 77, 78, questions 496-501, 346 and 347, questions 504-509.) The plaintiff's experts testified that damages and method of measuring damage was related to the generating capacity lost by the reduction in, or loss of head. (R. Ackerman 142, q. 136; Meyer 375-379.) That evidence was not in dispute, and as indicated above, contrary to the allegations of the petition herein, showed that "fast lands" of the plaintiff "were invaded" and plaintiff's "physical property" was "taken or destroyed". The Witness Hooper produced Exhibit 8, a map showing the area in the vicinity of the dam in question. Upon this map was shown the meander line of the St. Croix River. This meander line passes outside of and westerly from the spillway and power house of respondent's dam about fifty feet when the scale of the map is applied to the area between the spillway, power house, and the meander line. The only claim that is made by the government is that a guide wall from the tailrace of respondent's dam extends outward from the power

house a distance of thirty-four feet. (R. 152-153) Thus the only evidence in the record (in fact the government's witness Eckberg, R. 238 and 430-431, and Hooper, R. 152-153, support the conclusion as does Exh. 8 offered by the government) shows that not only did the government appropriate the "lower portion of the (our) draft tubes and the two generators we are using and the land below the dam across the Willow River (R. 346-347) but the company has been dispossessed of land below elevation 676 m. s. l." (R. 346-347, Schultz. The evidence is reproduced in the appendix.)

Thus, though counsel claim the court found a taking without evidence to support the conclusion, examination of the record discloses *all* the evidence in the record showed an invasion of three feet of plaintiff's land above ordinary high water mark at the dam and the approaches to it, and a consequent taking. However, petitioner's entire argument for allowing the writ herein is founded upon this erroneous premise. Thereby is destroyed every reason for allowing the writ because the premise on which the application rests is unfounded.

The remainder of the argument (P. 10-15) proceeds from this erroneous premise, and then confuses the effect of the evidence and the law. On page 11 the argument is made that the plaintiff's only damage consists in "raising the level of the St. Croix River into which its draft tubes discharge". Petitioner then continues, "Respondent's claim is thus based upon the asserted right to flow in a state of nature of a navigable river, the St. Croix." This claim is unsupported by the record as pointed out above. The plaintiff was careful to eliminate all claims for damages below ordinary high water mark. Its evidence was carefully directed toward proving damages only above ordinary high water mark, and the court carefully distinguished such damages and allowed recovery only for the taking above ordinary high water mark, that is, for the three feet of head between elevation 672

and 675 m. s. l. (Tr. 21, Par. 6) In the opinion the Court of Claims emphasized the basis for its finding and the care taken by the court in fixing the point where liability for the taking began. (Tr. 23-24) It said:

"Liability of the defendant, therefore, depends upon whether or not the level of the St. Croix River was raised above ordinary high water mark. It had a right to raise the level of the river to ordinary high water mark with impunity, but it is liable for the taking or deprivation of such property rights as may have resulted from raising the level beyond that point."

There is absolutely no evidence that the draft tubes or any other part of the plaintiff's dam was in the bottom of the St. Croix River, or that the tailrace was in the bottom of the river. (R. 46, Exh. 22, 23, Exh. D-2, Exh. E-2.) A similar claim was made before the Court of Claims on petitioner's proposed findings, but that court denied the contention upon the evidence of these exhibits and the parts of the transcript referred to above. (See brief attached to our motion objecting to motion not to print record.) The draft tubes have absolutely nothing to do with this issue. It is the head of water produced by the raising of the government's dam three feet above ordinary high water mark that causes the damage, because by that process respondent's power is destroyed as petitioner concedes (P. 5) when it says:

"Hence * * * any raising of the level of the St. Croix River at Hudson proportionately reduced the power head at respondent's dam."

Nor did the Court of Claims hold that "a riparian owner has as against the government (the right to a flow of the river as in a state of nature) such a right to the flow of a navigable river as to entitle him to compensation". (P. 10) Except as to the flowing above ordinary high water mark, the plaintiff did not make such a claim. It claimed only damages above the ordinary high

water mark, and the Court of Claims allowed damages to only that extent.

United States v. Chicago, M., St. P. & P. R. Co., 312 U. S. 592, 597-598, sustains the judgment in this case. In that case the Court merely held that as to property located in the bed of a navigable stream there could be no recovery. Thus it said, pp. 596-597:

"The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject."

It, therefore, did not disagree with the conclusion of the *Lynah Case* to the extent that that case allowed damages for a taking above ordinary high water mark. (p. 598) It only disagreed with the failure of the *Lynah Case* to distinguish between the right of the government in the stream up to ordinary high water mark, an absolute right without liability for compensation, as the Court of Claims declared in this case (Tr. bottom of page 23), and its right to appropriate adjacent property above ordinary high water mark, a right to be acquired only upon payment of just compensation. Therefore it said:

"But we think this Court has never followed it (*Lynah Case*) as a binding decision that compensation is due for injury or destruction of a riparian owner's property located in the bed of a navigable stream. And we think that, so far as it sanctions such a principle, it is in irreconcilable conflict with our later decisions and cannot be considered as expressing the law."

U. S. v. Chicago, M., St. P. & P. R. Co., 312 U. S. 592, 598.

The entire difficulty of petitioner here is it started out on the unsupported premise described above, that plaintiff's dam was in the bed of the St. Croix River. Being in error in that respect, the remainder of its argument, of course, is also unsupported.

The jurisdiction of this Court to review the record in the Court below arises only when it is shown that:

" * * there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."*

Federal Code Annotated, Vol. 8, Title 28, Sec. 288,
as amended May 22, 1939, Chapter 140, 53
Stat. 752.

Here, as pointed out above, the only evidence in the record shows conclusively that petitioner's claims are unfounded, and that the Court of Claims upon all the evidence found that plaintiff's "power plant was located near the confluence of the Willow River and the St. Croix River, in the City of Hudson, Wisconsin, on land owned by it above ordinary high water mark of the St. Croix River". (Tr. 19)

It is, therefore, respectfully submitted that the petitioner has failed to make a case for a writ of certiorari.

Respectfully submitted,

R. M. RIESER,
JOHN WATTAWA,
Attorneys for Respondent.

APPENDIX

APPENDIX TO SUPPLEMENT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

181. Q. In Exhibit "D-2" there are some sort of darker spots throughout the area toward the bottom of the picture that look like stumps. Is that what they are?

A. Yes, they are old tree stumps on the floor of the reservoir above the St. Croix dam.

182. Q. Then the area toward the bottom of Exhibit "D-2" is part of the old reservoir—or reservoir?

A. All the area from the plant as far as the picture shows is part of the floor of the old reservoir.

183. Q. And what was the size of some of those stumps?

A. Oh, two and one-half feet in diameter, eighteen inches to two and one-half feet in diameter.

Schultz, R. 280, 281.

184. Q. Is it true that the dam that you now use has a spill-way, that you have described here earlier in the testimony, is to the left of this picture "D-2", is that right?

A. Yes. Some distance to the left.

185. Q. That is the part that is used as a spill-way that is built across the Willow river itself, is that right?

A. Yes, only we don't use it as a spill-way. There is a gate there, but we haven't had it open for years.

186. Q. Now, I show you Plaintiff's Exhibit "E-1" to "E-4", inclusive, and ask you, first of all, when those were taken?

A. They were taken on April 5, 1942.

187. Q. Did you take those?

A. Yes.

188. Q. Do they reflect the conditions they purport to show as of about that date?

A. Yes.

189. Q. And are taken of the area involved in this proceeding, is that right?

A. Yes. The power house shown on a number of the pictures is the St. Croix plant power house.

190. Q. And the rest of them show the St. Croix river near its mouth?

A. The Willow river below the dike across Willow river. And the other one shows the direction of the river to the interstate bridge, although the channel of the Willow river is flooded out.

191. Q. Exhibit "E-2"?

A. It shows the results from the main railroad of the Chicago & Northwestern along the west bank of their embankment at the St. Croix plant.

192. Q. And shows the St. Croix plant, does it, in the distance, right in the immediate center of the picture?

A. Yes, power house and gates.

193. Q. Exhibit "E-1", what is that? From what direction of the dam is that shown?

A. That was taken from the north and looking southwest toward the Hudson passenger depot. You can see the depot in the extreme right hand of the picture, the water tower at the other, and then the east boundary of Lake St. Croix, or the St. Croix river, around to the dike at the power house.

194. Q. Is it true that the dam would be beyond the foot of the picture here, is that right, if continued?

A. The one across the Willow river, yes. The tainter gates are shown right adjacent to the power plant building, with the hoist in the left-hand side of the picture.

195. Q. (By Mr. Cox) The object there which projects into the St. Croix river, just about the center?

A. I would say that that is the north wall of the flume coming out of the power house.

196. Q. (By Mr. Cox) And extending into the St. Croix river?

A. Yes.

197. Q. (Mr. Rieser continuing) And that was taken at a time when the St. Croix river was at elevation 676.6, is that right?

A. That may be a little deceiving for that reason. The water is high on that projection, but that is the north wall of the flume permitting the water from the water turbines to get out into the lake.

198. Q. Exhibit "E-1", is it true it looks downstream from—down the St. Croix from your dam, is that right?

A. Yes, the view is taken toward the southwest.

199. Q. And Exhibit "E-2" is looking up toward the dam, along the same area, is that right?

A. Yes, it is almost looking north.

Exhibit "E-1" offered and received.

200. Q. In connection with your operation of the St. Croix dam prior to the building of the Red Wing dam, were you in the habit of observing and did you know about how, under normal conditions, the water discharged into Lake St. Croix or the St. Croix river?

A. Yes.

201. Q. And as a matter of fact, had you—when water was very low, what was the lowest elevation that you had observed in years prior to—say during the ten years prior to 1938—on the St. Croix river?

A. The lowest surface water on Lake St. Croix was 666. I don't remember whether it was .5 or .6 or .7—somewhere along in there. A fraction above 666.

202. Q. And what is the occasion for you remembering that elevation? Did you have to do something in connection with your operation there to—

A. I don't recall at present any specific thing that we were doing. We had repairs at the St. Croix plant a number of times.

203. Q. Did you extend this flume any at that time, or about that time?

A. The particular work connected with the low stage was the water wheel draft tubes were out of the water so that we couldn't get good operation and we had to extend them down to a lower level.

204. Q. Now then, that, you would say, was the lowest stage of water during your operations there?

A. The lowest that I have any definite knowledge on, yes.

Schultz, R. 18-21.

379. Q. Mr. Schultz, your St. Croix power house and a wing wall extends out therefrom to the westward, extend towards the St. Croix river, do they not?

A. Yes, the wing wall is only on the north part of the gate section.

Schultz, R. 31.

(Exhibits D-2 and E-1 and E-2 should be compared at this point to note that when they were taken the elevation on D-2 was before the Red Wing dam was raised, and E-1 and E-2 were taken when the dam was at elevation 676.6 or only slightly over the elevation maintained by the Red Wing dam which was 675. These photographs and this testimony should also be considered in connection with Exhibits 22 and 23.)

496. Q. Did the government take and occupy or does it now use or did it ever heretofore use any part of your power house, machinery or equipment?

Mr. Rieser: If you confine that to use, I will not have any objection. But if you say "take, occupy and use" I must object as a legal conclusion or it includes a legal conclusion.

Mr. Cox: Very well.

497. Q. Does it occupy or did it ever occupy your power house or any of the equipment therein?

A. It destroyed the use—

498. Q. I am not talking about destroying. I want to know whether the government ever physically occupied—

A. Not the power house, no.

Mr. Rieser: The question included also some of your other equipment in the power house.

499. Q. Or did it ever occupy or use any of your equipment or machinery in the power house?

A. The only portion would be the draft tubes, to my mind, that they probably did occupy. As far as the instruments in the power house goes, no.

500. Q. You mean the draft tubes there may have been submerged by water?

A. Yes, and it occupied it so we couldn't make use of it.

501. Q. But it never used it, did it, the government never used your draft tube?

A. Not to run water through, no.

Schultz, R. 77-78.

504. Q. Whether you have ever been physically ousted of any of your property there, of your land or of your power house or the machinery therein?

A. I would say we were ousted from the land and the use of our machinery, as I understand the word "oust" for the property that we have been making use of.

505. Q. I am using the word "oust" in the sense of being dispossessed?

A. Yes, I would say yes.

506. Q. Very well, now what part of your land, power house, or machinery have you been dispossessed or ousted?

A. I would say we have been dispossessed of the lower portion of our draft tube and the two generators we are using, and of the land below the dam across Willow river.

507. Q. In what way? In what manner?

A. That we can't use it. It is flooded so that we can't get down on that land.

508. Q. Have you been dispossessed or ousted of any land below elevation 676?

A. Yes.

509. Q. What part?

A. This same part that I referred to before. That is the only land that we have—

Schultz, R. 346-347.

586. Q. And the notation on Exhibit 23 with respect to the effect of the normal pool stage being indicated. What do you understand by that reference?

A. There is a well-defined mark on the rip-rap of the bank and also, of course, the structure.

587. Q. You mean the light area?

A. The light area is below the mark. The mark is rather dark. The Commissioner: What does the mark mean?

A. That mark was made by the water of the pool standing at its normal pool elevation.

588. Q. That is, the light part is between the mark and the surface of the water?

A. Yes, it is somewhat light there.

Eckberg, R. 238.

589. Q. And then there is an indication also along the edge of the water of the effect of wave action on the rip-rap to some extent, sort of a line there?

A. No, I can't say that is the effect of wave action. I don't doubt there has been some wave action, but I can't say from the mark.

590. Q. Isn't there a distinct indication of a wearing out there right on the upper line of that rip-rap?

A. No, I can't say so from the photograph. There may be some disturbance of the rip-rap from the water, but the photograph does not indicate it clearly.

591. Q. Then you and I just don't see right the same way, but that is for anyone to examine. In other words, you would expect to find some wearing out after a year or two of wave action on that rip-rap, wouldn't you?

A. Well, I would on bare soil. I wouldn't expect to find much of a nick cut in that rip-rap. Sometimes there are small particles of material in the rip-rap that might wash out.

592. Q. And the ice action would, of course, have the same effect?

A. The ice would have a different effect, if it had any.

593. Q. It would tend to wear out that rip-rap faster than it would ordinarily wear out if it was just exposed to the air?

A. If there was expansion of ice in the winter time it might tend to force the rip-rap up.

594. Q. And would follow generally the level of the water along the bank there, is that right?

A. There is a very fine line there that shows the pool elevation.
Eckberg, R. 430-431.

(It will be noted that in comparing Exhibits D-2, E-1, E-2, and 22 and 23 that the effect of the increase of head by three feet

is quite clearly illustrated and moreover that the area of fast land taken is marked by the strip indicated and described by Mr. Eckberg above.)

Mr. Hooper (R. 146-157), head of the Survey Department of the United States Engineers Office at St. Paul, a witness offered by the government, testified that on the 17th day of June, 1942, a few days before the trial of this case, he was at Hudson, and as to the condition of the water in the vicinity of the company's property he testified as follows:

87. Q. What was the condition of the water?

A. Well, the water was flooding out the west edge of the company's property. The water of the St. Croix was on that portion of the dam that extends out.

88. Q. What are those long walls extending out below the tainter gates towards the river?

A. By below I take it you mean downstream from the tainter gates?

89. Q. Yes, below the tainter gates?

A. I don't know whether they have an official name. They are apparently some sort of guide wall.

90. Q. Built of what material?

A. Concrete. It confines the tailrace from the power house.

91. Q. And approximately how far out beyond the bank do those extend?

A. Well, I would guess—the defendant's exhibit shows that.

92. Q. Would you look at that exhibit and state approximately, as near as you can?

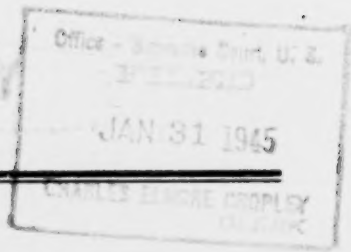
A. Defendant's Exhibit No. 8—I have to add some of these figures together—indicates it is thirty-two feet from the west face of the power house out to the edge of the westernmost crosswalk,

their walkway, and about two, and one-half feet farther to the end of the most westerly extent of the wall. That would be about thirty-four feet.

Hooper, R. 152-153.

Examination of Exhibit 8, when considered in connection with the scale of the map, indicates that even this witness's estimate as to how far the so-called guide wall extends out into the water still leaves the entire structure well within the meander line shown on the map. The guide wall is also pictured on Exhibits 22 and 23 and D-2 and E-1 and E-2, and shows very clearly that it is a part of the mainland and not within the river bottom as claimed.

FILE COPY



IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

J/2
No. ~~212~~

UNITED STATES, PETITIONER

v.

WILLOW RIVER POWER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENT

✓
✓
R. M. RIESER,
JOHN WATTAWA,
Attorneys for Respondent.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

No. 312

UNITED STATES, PETITIONER

v.

WILLOW RIVER POWER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Claims (R. I, 21-25) is reported in 101 C. Cls. 202.

STATEMENT OF FACTS

Because the Government's statement of facts has woven throughout its fabric misapprehension of the facts or the conclusions to be drawn therefrom, it will simplify presentation here if the facts as the record supports them are set forth at length. Where actual clash in the two statements appear, our statement sets forth these facts in black face type.

Respondent is a public utility company incorporated under Wisconsin laws and operating a small utility plant in and in the

vicinity of Hudson, Wisconsin, a city of about 3,000 people, located at the confluence of the St. Croix and Willow Rivers. The St. Croix River is navigable (R. I, 17, 19). The Willow River is not (R. I., 23). As stated by the Government, the St. Croix River resembles a lake in the vicinity of Hudson. The area showing the St. Croix River and the Willow River in the immediate vicinity is shown in Exhibit 2.

The respondent maintains four dams on the Willow River, a small Wisconsin stream only about 40 miles long in a straight line and 70 miles long if we follow the meandering course of the stream. It has a drainage area of only 263 square miles (Exh. JJ, p. 8, Par. XIX, Item 8). The lower of the four called St. Croix Dam is involved here. This dam was authorized by Chapter 122, Private and Local Laws of Wisconsin, 1866, (Exh. 6), and the charter was amended by Chapter 15, Private and Local Laws of Wisconsin, 1872, by extending to the particular dam so erected the provisions of the Mill and Mill Dam Act, Chapter 56, Wisconsin Statutes, 1858. The dam, of course, has been maintained ever since 1866 under this authority and has therefore existed by virtue of legislative authority of the State of Wisconsin and its rights are fixed by the decisions of its courts, as will appear herein.

The dam in question was created by building a fill and a gate across the Willow River channel (Exh. 7) and then cutting a new channel over respondent's fast land. This land was a strip of high fast land owned by respondent along the bank of the St. Croix River and was from 125 to 150 feet wide. The former channel of the Willow River flowed close to this land before the channel was filled (Exh. A).

Into the new channel many years ago respondent's predecessors built the generating equipment constituting the dam involved in this suit. It consists of a power house containing two generators (R. II, 42), a spillway with regulating tainter gates, and flash walls on either side. All this equipment was located on

respondent's land (R. I, 19, Exh. A, Exh. E-2, Exh. 23, Ans. R. I, 11-12, Par. 4).

Ordinary high water in the St. Croix River was elevation 672 feet m. s. l. (R. I, 20, Par. 5). At this level respondent's dam had an operating head of 17 feet, that is, 17 feet of respondent's total head of $22\frac{1}{2}$ feet were above ordinary high water mark (R. I, 21, Par. 5). When the so-called Red Wing Dam in the Mississippi River was built to improve navigation in the Mississippi and St. Croix Rivers and completed in 1938, the level of the St. Croix River was raised slightly more than 3 feet above ordinary high water mark, that is, to elevation 675.3 m. s. l. (R. I, 24). The result was that after the Red Wing Dam was erected, respondent's head was reduced to slightly under 14 feet. Respondent's property was devoted to the use and operation of this dam. The fast land helped to confine the pool and the dam to generate the power. As indicated in appellant's brief (p. 5), the power output of the dam was dependent upon the operating output of this dam, and when the power output was decreased the unit constituting the generating equipment as well as the land used in connection with it were damaged accordingly.

Even though denied by the Government it is nevertheless indisputable that in the St. Croix River above elevation 672 feet m. s. l. and to elevation 675.3 feet m. s. l., the Government, of course, took all of respondent's land between these elevations (R. II, 42). That is illustrated also by Exhibit 22 showing the light areas along either side of the dam and power house. At the time that picture was taken the elevation in the pool was 672.1 feet m. s. l. (R. II, 47, q. 575, 577, R. II, 48, q. 586-588).

The pictures in Exhibit 22 were taken on March 6, 1940, while the pool was drawn down from November, 1939, to April 1, 1940, to permit the cutting of timber between ordinary high water mark and the pool level elsewhere on this flowage.

Issue was joined in this case and the case was tried by the Government upon the theory that the Willow River like the St. Croix River was navigable. Thus the Government's answer said:

"Defendant admits that along the course of the Willow River the plaintiff has developed several integrated and synchronized water power sites by construction of dams at such sites, one of which is located near the point where the Willow River discharges into the St. Croix River upon property more particularly described in Paragraph 4 of the petition." (R. I, 11, Par. 4)

And again said:

"Further answering, the defendant states and shows unto the Court that the dam so constructed by the plaintiff near the point where the Willow River discharges into the St. Croix River (or Lake St. Croix) *was constructed upon a concrete foundation extending across or occupying the full width of the mouth of a navigable stream, and said foundation now rests upon the bed of said stream below the ordinary high water elevation thereof*; that by such construction and the erection of tainter gates thereon and thereover, the water of Willow River has been dammed and caused to be artificially held back, so that its elevation since the erection of said foundation and tainter gates is approximately 22 feet above its natural elevation, in consequence of which commerce and navigation between points on the Mississippi River, by way of Lake St. Croix, and points on Willow River can no longer be carried on because of the obstruction to navigation said dam interposes, and as a further consequence the Mississippi River, of which Willow River is tributary-feeder, has been deprived of the free, natural, and unimpeded flow of water from said Willow River." (Emphasis supplied) (R. I, 12)

The case was tried upon that theory and no claim was asserted, expressly or otherwise, but that the St. Croix Dam was located outside of the St. Croix River. That defense was still the theory

of the Government when it appealed to this Court, for it assigned as error that the Court of Claims had erred in finding the Willow River was non-navigable. That defense was abandoned by stipulation after this Court took jurisdiction (R. II, 49-50). The Court of Claims found:

"The plaintiff, Willow River Power Company, is a public utility company of the State of Wisconsin. During the times here involved it developed electric power hydraulically and by other means and sold it to the surrounding community. Its power plant was located *near the confluence of the Willow River and the St. Croix River, in the City of Hudson, Wisconsin, on land owned by it above ordinary high water of the St. Croix River.*" (Emphasis supplied) (R. I, 19, Par. 1)

Another issue vigorously contested at the trial was the claim that ordinary high water mark was not 672 feet m. s. l. claimed by respondent and found by the Court of Claims (R. 120, par. 5), but 676 feet m. s. l. (R. I, 24), claimed by the Government. The issue raised on this appeal is an afterthought so far as location of respondent's dam is concerned. It was raised inferentially for the first time in the fifth assignment of errors. No pretense appears in the record that the Government ever requested any finding in the Court of Claims confirming its claim here that any part of respondent's dam was located in any part of the St. Croix River.

The Court found ordinary high water mark to be 672 feet m. s. l. That finding is not disputed here. The Court also found that the head of respondent's dam above ordinary high water mark was 17 feet and that by the operation of the Red Wing Dam this head was reduced to slightly under 14 feet (R. I, 21). Upon completion of the Red Wing Dam, the head on that dam created backwater for more than 30 miles above the dam. That, of course, was the philosophy of improvement in order that navigation upon both the Mississippi and the St. Croix Rivers might be improved. In so backing up the water, it raised the water in the St. Croix River to 675.3 feet m. s. l. at Hudson. The effect of this increase

in elevation between 672 feet m. s. l. found by the Court as ordinary high water, and 675.3 feet m. s. l., the elevation of the Red Wing pool at Hudson, is graphically illustrated by Exhibit 23, Photo 594, made March 6, 1940, when the pool had been lowered as indicated above to elevation 672.1 feet m. s. l. (R. II, 47, q. 576, Exh. 14, 15, 16; Nov. to Mar., 1940, hydrographs; Exh. 23). As indicated by Exhibit 23, *"the normal pool stage which is about 3 feet above the stage shown was very evident in the water mark along the dam tailrace and shoreline"* (light areas) (Emphasis supplied). Examination of this exhibit (Exh. 23) also shows that the respondent's dam is well outside the water line of the St. Croix River even when the St. Croix River is at ordinary high water mark, which the Court found one-tenth of a foot lower than the stage shown on Exhibit 23. The same fact appears from Exh. E-2 in this record. The water line at stage 675.3 m. s. l. is also shown on Photo 593 of this exhibit and on Exhibit 22 (both pictures). On Photo 591, Exhibit 22, the wing wall is shown in line with the mainland. A similar condition is shown by "south elevation" on Exhibit 8 and is also indicated on Exhibit E-2. Here again the land is shown to extend out considerably beyond the power house and appurtenant structures. Exhibit 8 was made June, 1942, when the water elevation ranged between 675 to 682 feet m. s. l. (Exh. 15, gauge heights 1942 at Prescott. The same is illustrated by Exhibits 14 and 16 gauge heights at Stillwater and Hudson).

It is also claimed that the draft tubes in this dam had been extended out into the St. Croix River. This is not supported by the evidence in the record (R. II, 39, q. 203). The testimony was only that when the draft tubes had to be extended at a time when Lake St. Croix was below elevation 666 m. s. l., the draft tubes had to be extended "down to a lower level". It was merely, however, for the apparent temporary purpose of furnishing draft while the water was at the extremely

low elevation, the lowest in the history of operation of the dam. (R. II, 39, q. 204) The Government made no effort at that time and in no manner indicated that it was material to the Government where the draft tubes were located. It is only by inference now that they attempt to say that the draft tubes were either in the St. Croix River or extended to the St. Croix River, as claimed in the Government's brief. No finding or suggested finding has been produced by the Government to indicate that it advised the Court of Claims or advised respondent of a change in its theory of this case as set forth in its answer to the effect that the Willow River dam was located entirely across the Willow River and was in no manner located within any part of the St. Croix River. The evidence in any event all entirely negatives such a conclusion.

As a result of the loss of 3 feet of head, the respondent was forced to obtain additional power from a new source, the cheapest available source, that is by purchase from Northern States Power Company. The additional cost of this energy compared with the cost of generation at the St. Croix dam was capitalized to establish the damages (R. 348-354). The Government did not dispute the amount of the damages or the method of arriving at them. It offered no evidence on the issue. Although the damages were thus established to be \$80,000, the Court of Claims, "by way of a jury verdict", assessed the damages at \$25,000 plus interest at $4\frac{1}{2}\%$ from August 12, 1938, to date of payment of the judgment (R. I, 21, 25, 32). No issue is raised here as to the amount of the damages or the method of arriving at them.

QUESTIONS PRESENTED

There is presented here in fact only one question: In a case where a dam is built across a non-navigable stream and upon fast land owned by the owner of the dam, may such owner recover damages for the taking of so much of the dam as is above ordinary high water mark?

ARGUMENT

I. ISSUES ON APPEAL

Prior to the passage of 53 Statutes 752, Act of May 22, 1939, Chapter 140, only questions of law were reviewable by this court.

Niles-Bement-Pond Co. v. U. S., 281 U. S. 357; (1930)

Luckenbach SS Co. v. U. S., 272 U. S. 533; (1926)

U. S. v. Omaha Tribe of Indians, 253 U. S. 275; (1920)

By the Act of May 22, 1939, the scope of review is expanded to include the following:

"* * * there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

Federal Code Annotated, Vol. 8, Title 28, Sec. 288,
as amended May 22, 1939, Chapter 140, 53
Stat. 752.

The appellant's brief does not indicate that it relies upon any part of this statute. With the possible exception of Assignment No. 5, the Assignments of Error do not indicate any attempt to attack the court's findings or the sufficiency of its findings. The record also shows clearly that no findings were requested on any issue claimed material now. Nor is it argued that there was lack of substantial evidence or that for any reason the ultimate findings are not sustained. Any indication of any attack upon the court's findings is absent in the brief here. Instead, however, claims as to what the evidence shows are made either without support from the record or in actual conflict with the record, and the argument then proceeds as if based upon a finding or upon undisputed fact. Under the circumstances, we submit the issues

on this appeal must now be decided upon the findings which cannot be contradicted, and that therefore the issues here are purely propositions of law based upon the findings of the Court of Claims and related only to issue as to the right of recovery for a "taking" above ordinary high water mark."

II. THE LAW UNDERLYING THE ISSUES IN THIS CASE

Before proceeding to the argument in this case, it may be helpful to limit the discussion by concessions as to the law to be applied to the facts in this case. This will answer in a large degree the brief of appellant.

Within the bed of the St. Croix River as a navigable stream, being the area below ordinary high water mark, the owner of the shore has title under Wisconsin law.

Kaukauna Co. v. Green Bay, etc. Canal Co., 142 U. S. 252, 272; (1891)

Wisconsin River Improvement Co. v. Lyons, 30 Wis. 61; *Merwin v. Houghton*, 146 Wis. 398, 409; (1911)

This title in the area below ordinary high water mark, however, is a qualified title subject to the dominant power of the United States.

U. S. v. C. M. St. P. & Pac. R. R. Co., 312 U. S. 592; (1941)

U. S. v. Chandler-Dunbar Co., 229 U. S. 53, 62; (1913)

Fox River Co. v. R. R. Commission, 274 U. S. 651; (1927)

"The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject."

U. S. v. C. M. St. P. & Pac. R. R. Co., 312 U. S. 592; (1941)

Property, however, above ordinary high water mark is not subject to any similar servitude, and when such property is taken by the Government the owner is entitled to compensation.

U. S. v. Chandler-Dunbar Co., 229 U. S. 53, 60, 65;
(1913)

Likewise when there is a taking in a non-navigable stream by backing water from the navigable stream into the non-navigable stream, there is a taking for which compensation must be rendered.

U. S. v. Cress, 243 U. S. 316, 329-330; (1917)

There is a taking by flooding a part of any property above ordinary high water mark to the extent of the flooding.

U. S. v. Grizzard, 219 U. S. 180, 183; (1910)

Bauman v. Ross, 167 U. S. 548; (1896)

So:

"It is not always an absolute taking of land which constitutes a taking of private property for public use: * * * a serious interruption to the common and necessary use of the property may be equivalent to a taking of it."

Jackson v. U. S., 31 Ct. of Cls. 318, 321;

U. S. v. Great Falls Mfg. Co., 112 U. S. 645; (1884)

U. S. v. C. B. & Q. R. R. Co., 82 F. (2) 131, 133,
136; (1936) Cert. Denied 298 U. S. 689.

And so it was said in *Gibson v. U. S.*, 166 U. S. 269, 276 (1896), reaffirming *Pumpelly v. Green-Bay Co.*, 13 Wall. 166:

"It was held that the permanent flooding of private property may be regarded as a 'taking'. In those cases there was a physical invasion of the real estate of a private owner and a practical ouster of possession."

Gibson v. U. S., 166 U. S. 269, 276.

And:

"Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated but the damage to the remainder resulting from that taking embracing, of course, injury due to the use to which the part appropriated is to be devoted."

U. S. v. Grizzard, 219 U. S. 180 (1910).

Likewise it has been said that:

"It is the character of the invasion, not the amount of the damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

U. S. v. Cress, 243 U. S. 316, 328-329; (1917)

U. S. v. C. B. & Q. R. R. Co., 90 Fed. (2) 161, 171.

Cert. Denied 298 U. S. 689; (1937)

U. S. v. Great Falls Mfg. Co., 112 U. S. 645; (1884)

Hurley, Sec. of War, v. Kincaid, 285 U. S. 95; (1932)

The law of Wisconsin with respect to the rights of a property owner in non-navigable streams vests in such property owner the title to the bed of the stream and he may not be deprived of his improvements therein without being paid just compensation.

The Legislature of Wisconsin has defined navigable streams, Statutes of 1858, Chapter XLI, Sec. 2, which provides:

"All rivers and streams of water in this state, in all places where the same have been meandered, and returned as navigable by the surveyors employed by the United States government, are hereby declared navigable to such an extent that no dam, bridge, or other obstruction may be made in or over the same, without the permission of the legislature: *provided*, that nothing herein contained shall be construed so as to affect any act now in force granting to towns, or county boards of supervisors, the power to erect or authorize the construction of bridges across such streams."

The Mill Dam Act, also part of the Statutes of 1858, Chapter LVI, Sec. 1, provided that:

"Any person may erect and maintain a water mill, and a dam to raise water for working it, upon and across any stream that is not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed."

In the instant case the stream was not meandered by the Government (R. 1, 23), and the improvement here was made with legislative authority and thereafter recognition was given that under ~~this~~ authority rights under the Mill Dam Act arose (Chapter 122, Private and Local Laws of Wisconsin, 1866 (Exh. 6), Chapter 15, Private and Local Laws of Wisconsin, 1872). Under those circumstances the Wisconsin court has held that those who make improvements in streams of this kind under authority of law acquire property rights which cannot be divested without compensation.

A. C. Conn Co. v. Little Suamico Lbr. Mfg. Co., 74 Wis. 652, 656; (1889)

McDonald v. Apple River Power Co., 164 Wis. 450, 454; (1916)

Charnley v. Shawano Water Power & River Improvement Co., 109 Wis. 563, 569 (1901).

This is also the law in the Federal courts.

Scranton v. Wheeler, 79 U. S. 141 at 146; (1900)

Monongahela Navigation Co. v. U. S., 148 U. S. 312 (1893).

And;

"The nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the states."

Fox River Paper Co. v. R. R. Com., 274 U. S. 651, 655. (1927)

The law in Wisconsin has been summarized in this manner:

"The rule of law as to the right of a riparian owner, respecting the flow of water over his land, is indicated in the authorities cited by counsel. The same principle has recently received direct sanction from the House of Lords, as follows: 'It has now been settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturee*, belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbor's soil for his own in its natural state. *North Shore R. Co. v. Pion, L. R.*, 14 App. Cas. 621."

Kaukauna Water Power Company v. Green Bay & Mississippi Canal Company, 75 Wis. 385, 390 (1890).

With greater reason, of course, do the laws of the states govern the rights in streams not navigable.

III. THE DAMAGES HERE WERE THE RESULT OF A TAKING OF RESPONDENT'S FAST LANDS WHICH INCLUDED PART OF THE DAM AND GENERATING FACILITIES. THIS DAM AND FACILITIES WERE THE ELEMENTS TO WHICH THE ENTIRE VALUE OF RESPONDENT'S ENTERPRISE ATTACHED AND THEREFORE DETERMINED RESPONDENT'S DAMAGES

The argument of appellant proceeds from two misconceptions, i.e., (1) as to the facts, and (2) as to the law as applied to the record in this case.

As indicated above, the Government throughout its case before the Court of Claims claimed the dam in question was located

within the Willow River (this brief, 3- to 4-). The general rule almost universally applied is that "the allegations, statements and admissions contained in the pleading are conclusive as against the pleader".

49 C. J. 122, Note 55.

Davis v. Wakelee, 156 U. S. 680, 689; (1895)

While in this case the Government in a sense did not succeed in convincing the Court of Claims that the Willow River was navigable, it permitted its answer to stand before the trial and after judgment without a protest until for the first time in this Court it seeks to change its position and to claim that the St. Croix Dam rests in the St. Croix River. Under the authorities, such a change of position should not be permitted.

It changed that position only after this appeal was taken but it supports the claim only by asserting two insignificant parts of the dam were located in the St. Croix River, one, the draft tubes and two, a guide wall. The Court of Claims found expressly that the dam was located upon respondent's fast land (R. I, 19). It made no exceptions. Thus it said:

"Its (respondent's) power plant was located *near* the confluence of the Willow River and St. Croix River * * * *on land owned by it* (respondent) above ordinary high water of the St. Croix River." (R. I, 19)

Exhibits E-2, 22 and 23 illustrate the correctness of this finding. Exhibit 22, with the water one-tenth of a foot above ordinary high water mark, shows plainly that the guide wall is within the line of the land on either side. Exhibit E-2 confirms this conclusion. It was taken with the water at elevation 676.1 m. s. l. (R. II, 38-39). As to the wing wall, the only evidence relied upon was that of Rodger Hooper based upon investigations in June, 1942 (the exact date in June is not fixed), but during that month the water ranged from 675 feet to 681 feet m. s. l. (Exh. 14, 15, 16).

In other words, it was 3 feet above ordinary high water mark or higher. The witness described the wall as extending out 34 feet from the "west face of the power house" (R. II, 46, q. 92). These walls extended "towards the river" (R. II, 46, q. 88). He also spoke of the walls resting in the "bottom of the river" (R. II, 46, q. 94, 98). What river is not clear and was not material at the time of trial in view of the attitude of the Government that both rivers were navigable. He did say, however, that "the water was flooding out the west edge of the company's property" (R. II, 46, q. 87).

What is clear, moreover, is that the witness was discussing a situation as he found it in June, 1942, when the river encroached upon respondent's property a great deal more than it did at ordinary high water as is shown by Exhibit 22. The witness did not testify as to conditions in the light of ordinary high water nor did he testify as to the necessity of this guide wall as an adjunct to or part of the power development. In this connection it is also significant that the meander line shown on Exhibit 7 extends out as much as 50 feet into the water from respondent's dam in 1942 when this map was made. (This is based upon the scale of the map applied to the area in question.) The meander line determined conditions at the time of survey; it then marked the bank as it existed and determined the amount and quantity of the land sold by the Government. By specific instructions to surveyors, "*meander lines will not be established at the segregation line between dry and swamp lands, but at the ordinary high water mark of the actual margin of rivers or lakes*", etc. (Emphasis supplied) (Par. 154, P. 162, Manual of Surveying Instructions, U. S.).

Hardin v. Jordan, 140 U. S. 371, 380. (1891)

R. R. v. Schurmeir, 7 Wall. 272.

Courtfield v. Smyth, (Ore.) 138 Pac. 227.

Johnson v. Knott, 13 Ore. 308.

With reference to the draft tubes, it is claimed that these extended into the St. Croix River. There is absolutely no evidence of this. Respondent's witness Schultz testified merely that on one occasion when the water in the St. Croix River was below elevation 666 feet m. s. l. "we had to extend them (the draft tubes) *down* to a lower level" (R. II, 39, q. 203). That was at a time when the water was the lowest that the witness had any definite knowledge of (R. II, 39, q. 204). It does not appear whether this was a temporary extension. Certainly it was to adapt the operation to a most unusual situation. Examination of Exhibit 22 and E-2 will disclose, however, that the dam and the generating facilities are located well inside of the embankments on either side and the tubes were "the water wheel draft tubes".

No claim was made in connection with this evidence nor was any evidence introduced to supplement the same to indicate that the Government claimed the draft tubes in question extended into the St. Croix River. In fact, in the instant brief apparently the Government confuses its own position in various parts of its brief. Thus, while in its earlier argument it asserts respondent's dam is located in the navigable St. Croix River, at page 16 it says, "*As here the plaintiff in the Cress Case owned a dam located in a non-navigable tributary of a navigable waterway*" (Emphasis supplied).

Thus it appears that the evidence clearly bears out the finding of the lower court that the dam was located upon respondent's land. That, even in a proper case, ends this court's function upon a review of the facts supporting the lower court's findings since its function on appeal is a limited one. (Fed. Code Ann., Vol. 8, Title 28, Sec. 288, 53 Stats. 752).

From the error as to the facts, counsel then proceed to argue that respondent can have "no private property rights in the flow of a navigable stream as against the paramount right of the United States to improve navigation". We admit that, but it is of course apparent that this has no significance in a consideration

of this case and the cases cited (p. 12-14) bear out no more than the proposition that up to ordinary high water mark within the bed of a navigable stream, private property is subject to the paramount right of the Federal Government to improve the stream for navigation and to use the facilities within that bank up to ordinary high water mark for this purpose.

We confess that when the complaint in this action was filed on February 6, 1940 (R. I, 3), we were proceeding under the same theory advanced in *United States v. Chicago, Milwaukee, St. Paul and Pacific R. R. Co.*, 312 U. S. 592 (1941), relying upon earlier decisions of this court. But when the decision in the *Milwaukee Case* was announced on March 31, 1941, we adapted our proof in this case to the elements of damage resulting from the appropriation of property above ordinary high water mark. The evidence in this case was not taken until June, 1942, and the court's findings carefully confirm the damage to that above ordinary high water.

On page 14 of the brief, the statement is made, "But ordinary high water mark has no relevancy where the damages complained of are changes in the flow of the river, not the flooding of land". In the footnote it is claimed that no claim was made that the raising of the water level "flooded fast lands or caused any physical injury to its power plant". The testimony is undisputed that fast lands were flooded. It is shown by the Government's own exhibits (Exh. 22 & 23) and the testimony of witness Hooper (R. II, 45-46). The pictures in Exhibit 22 show the physical evidence of it. Common knowledge as to the action of water, of course, would leave no doubt of such a result. But the Government was not satisfied with specifically showing this fact. On cross-examination of the witness Schultz (R. II, 42-43) it, of course, is made perfectly plain what would be obvious from a knowledge that the water was raised that what took place here was a dispossession of the respondent and an appropriation by

the appellant of fast lands and a destruction of the generating capacity of part of the dam. (See also R. II, 48, q. 586-589.) That constitutes a taking within the cases cited above, pp. 10 to 11, and creates the implied promise on the part of the Government to pay therefor.

This dam, as indicated by the findings of the Court, was located in a non-navigable tributary of the St. Croix River just as in *United States v. Cress*, 243 U. S. 316, relied upon by the Court of Claims, and for the same reason the respondent is entitled to damages for what was taken above ordinary high water mark.

If in the instant case in constructing the dam Respondent had only excavated its own fast lands to elevation 672 feet m. s. l. and built its generating plant as here, and thereupon the Government had completed the Red Wing dam and raised the water to elevation 675 feet m. s. l., taking as here 3 feet of the dam, can there be any doubt as to the taking and the right of recovery of damages which would be the same as now? The fact that respondent excavated its own land to below elevation 672 feet m. s. l. and then built its dam should not change the principle.

We will not burden the court with a detailed analysis of the cases. Most of them deal with structures within navigable rivers or with conditions below ordinary high water mark (App. Br., pp. 13-15). The cases are in point only upon the wholly erroneous and unsupported assertions as pointed out above that this dam was located within a navigable river. For this reason the frequent reference to the "flow of the navigable river" to which we make no claim is wholly beside the point.

With some apology, because we regret the necessity of repetition but it is made necessary by the method in which the subject is treated in the Government's brief, we call attention to the fact that the Court of Claims found only that the "levels" of the Willow River were not affected (R. I, 20, par. 5). Obviously

this was true because the elevation of the St. Croix River was only 675.3 feet m. s. l. after the erection of the Red Wing dam, while the elevation of the Willow River at the St. Croix Dam was 689 feet m. s. l. (That is, 17 feet higher than ordinary high water, or 672 feet m. s. l. plus 17 feet.) (R. I, 21) The Court of Claims did not find, as asserted in appellant's brief (p. 17) "that the *flow* of the non-navigable stream (Willow River) is not altered" (emphasis supplied). (Compare R. I, 20-21, par. 5) The philosophy of the footnote on page 17 seems self-destructive.

What is said concerning rights of respondent in Willow River (App. Br., pp. 18-19) under Wisconsin law is applied to a river requiring legislative approval. The Willow River by express legislative action in 1872, Chapter 15, Private and Local Laws of 1872, was made subject to rights under the Mill Dam Act and required no legislative sanction for the erection of dams because it was not deemed to be navigable.

See *Allaby v. Mauston Electric Service Co.*, 145 Wis. 345, 349, 351 (1908).

McDonald v. Apple River Power Co., 164 Wis. 450 (1916).

A. C. Conn Co. v. Little Suamico Lbr. Mfg. Co., 74 Wis. 652, 656 (1889).

Moreover *Falls Mfg. Co. v. Oconto River Improvement Co.*, 87 Wis. 134 (1894), cited in appellant's brief, is distinguishable also because in that case the legislative authority required maintenance of a log chute as part of the dam, and the Oconto River was recognized by the Federal Government as navigable by the grant of special authority for its improvement.

IV. SINCE THE FLOODING OF THE PROPERTY ABOVE ORDINARY HIGH WATER MARK CONSTITUTES A TAKING AND THE CLAIM HERE IS ONLY FOR A TAKING ABOVE ORDINARY HIGH WATER MARK, THE ARGUMENT (P. 22-28 OF GOVERNMENT'S BRIEF) FAILS

The argument of the appellant carries its own answer. Certainly it is not supported by the cases cited.

We repeat again the Court of Claims only awarded damages for a taking above ordinary high water mark. It cannot be questioned that above ordinary high water mark "the right to have the water (of a non-navigable stream) flow away from the mill dam unobstructed except as in the course of nature" has not been questioned to this date.

U. S. v. Cress, 243 U. S. 316, 318 (1917).

This case was carefully reviewed by this court in *U. S. v. C. M. St. P. & P. R. R. Co.*, 312 U. S. 592 (1941). As a result *U. S. v. Lynah*, 188 U. S. 445 (1903), was overruled only to the extent it allowed damages for a taking below ordinary high water mark. *U. S. v. Cress*, 243 U. S. 316 (1917), was not overruled. It was accepted as governed by the limitations placed upon *U. S. v. Lynah*, 188 U. S. 445 (1903). We believe likewise the conclusions of the court as to issues referred for retrial evidences an accepted concept that by *U. S. v. C. M. St. P. & P. R. R. Co.*, 312 U. S. 592 (1941), no other changes in the law were justified.

Nor do the cases (cited p. 23) sustain appellant's argument. Thus the *Cress Case*, 243 U. S. 316, recognizes the right of a riparian to use a non-navigable stream and in using it to have the water flow away from it "as in the course of nature". That means that the lower riparian cannot block the stream from the upper riparian and thereby take his property.

U. S. v. Rio Grande D. & I. Co., 174 U. S. 690 (1899), says that this reciprocal right applies between persons having rights

in the navigable stream and those having corresponding rights in the non-navigable stream, and so this Court said that:

"In the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, *as the owner of lands bordering on a stream*, to the continued flow of its waters". (Emphasis supplied) (703)

And likewise, as a reciprocal right the owner of property on the non-navigable stream may not so use the water in that stream as to interrupt the navigability of the navigable stream below him. (703) But that right is no greater and no different than the right of any lower riparian. It imputes no more than the language giving the riparian the right to have the waters of the river flow "as in the course of nature". Any lower riparian may demand that right, but he obtains neither the right to destroy the dam of the upper owner nor to flood it out by his own dam. He has merely the right to compel the upper owner to permit the water to flow in the stream so as not to destroy it. As indicated, these rights are "corresponding" or "reciprocal". That creates no right of the lower owner to take what belongs to the upper owner unless he pays for it.

And so while the Government "may resort to all means for the exercise of a granted power", (*Oklahoma v. Atkinson Co.*, 313 U. S. 508, 534 (1941)), and in the improvement or protection of navigation may control the flow of non-navigable streams as any other lower owner or anyone else having a right to the unobstructed flow of a stream may do, it may not appropriate and therefore "take" without paying compensation for private property for such a project except in the single case where the property is located in the "bed" of the navigable stream. This Court in *Oklahoma v. Atkinson Co.*, 313 U. S. 508 (1941), was quick to stress that in that case "there is no complaint that any property owner will not receive just compensation for the land taken." (534)

U. S. v. Utah, 283 U. S. 64 (1931), has no application on the peculiar facts. The United States was suing as an owner of the lands along the non-navigable stream involved. It prevailed only to that extent (90). *U. S. v. Powelson*, 319 U. S. 266 (1943), sustains the right to recover for property taken on and in a non-navigable stream.

V. THE DAMAGES ARE NOT CONSEQUENTIAL. (GOVERNMENT'S BRIEF, pp. 28-31)

It is apparent, of course, that here there was a "physical invasion of respondent's real estate" and an ouster of his possession to the extent of such invasion.

Transportation Co. v. Chicago, 99 U. S. 635, 642. (1878)

Part of that real estate was the generating equipment which had been built into and completely incorporated as a part of the real estate. The damage was substantial, and appellant's brief fails to point out why the taking here is any different from one where a building or other structure or development has been flooded above ordinary high water mark to the extent of 3 feet. The cases cited in this brief and conceded by respondent all hold that flooding is "taking", and accordingly require the Government to respond in damages. Nor does the fact that the damages must be measured in terms called the "power potential" of this dam change the nature of this taking. The complete answer to this seems to be that appellant never attacked the method of establishing respondent's damages, it offered no estimate of the amount of damages to contradict that offered by respondent, and has not attacked the Court of Claims' conclusion as to the amount of damages. It is clear that in a case like this measurement of damages must necessarily follow some method that relates the damages to the place where the taking has its real impact. So the embankment, or the flood gates, part of each of which were

taken, can furnish little basis for real appraisal. Combined with them and the real reason for their use were the large generators and related equipment. Together they constituted a unit of respondent's property. Three feet of that unit was taken above ordinary high water mark. The impact of the taking strikes at these generators and their efficiency as part of the unit. Accordingly, the impairment of that efficiency measures the loss in a case like this.

Leonard v. Rutland, 28 Atl. 885, 66 Vt. 105, 109; (1894)
Connecticut Ry. and Lighting Co. v. Palmer, 305 U. S. 493, 494, 503-505; (1939)

Piazzek v. Drainage District, 119 Kansas 119, 124; 237 Pac. 1059-1061; (1925)

Pottawatomie Commissioners v. O'Sullivan, 17 Kansas 58, 60. (1876)

The distinction between consequential damages and actual damages has been frequently pointed out in this court.

Gibson v. U. S., 166 U. S. 269; (1897)

Bedford v. U. S., 192 U. S. 217, 225; (1904)

U. S. v. C. B. & Q. R. Co., 82 Fed. (2) 131, 137-139; (1936). Cert. Denied 298 U. S. 689.

See also *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 312.—OCTOBER TERM, 1944.

The United States, Petitioner, }
vs. } On Writ of Certiorari to the
Willow River Power Company. } Court of Claims.

[March 26, 1945.]

Mr. Justice JACKSON delivered the opinion of the Court.

The Willow River Power Company has been awarded \$25,000 by the Court of Claims as just compensation for impaired efficiency of its hydroelectric plant caused by the action of the United States in raising the water level of the St. Croix River. Reality of damage and reasonableness of the award are not in issue. Our question is whether the damage is the result of a "taking" of private property, for which just compensation is required by the Fifth Amendment.

Willow River in its natural state was a non-navigable stream, which flowed to within a few rods of the St. Croix River, turned and roughly paralleled it for something less than a mile, and then emptied into the St. Croix. Many years ago an earth dam was thrown across the Willow about a half-mile above its natural mouth. A new mouth was cut across the narrow neck which separated the two rivers and a dam was built across the artificial channel close to or upon the banks of the St. Croix. Here also was built a mill, which operated under the head produced in the pool by the two dams, which obstructed both the natural and the artificial channel of the Willow River.

These lands and appurtenant rights were acquired by the Willow River Power Company, a public utility corporation of the State of Wisconsin, and were devoted to hydroelectric generation for supply of the neighborhood. The plant was the ~~lowest~~ of four on Willow River operated by the Company as an integrated system. The power house was located on land owned by the Company above ordinary high water of the St. Croix. Mechanical energy for generation of electrical energy was developed by water in falling from the artificial level of non-navigable Willow River to the natural level of navigable St. Croix River. The elevation

lowest

of the head water when at the crest of the gates was 689 feet above mean sea level. The operating head varied because elevation of the tail water was governed by the fluctuating level of the St. Croix. When that river was low, the maximum head was developed, and was 22.5 feet; when the river was at flood stage, the operating head diminished to as little as eight feet. The ordinary high water mark is found to have been 672 feet, and the head available above that was seventeen feet.

The Government, in pursuance of a congressional plan to improve navigation, in August of 1938 had completed what is known as the Red Wing Dam in the upper Mississippi, into which the St. Croix flows. This dam was some thirty miles downstream, but it created a pool which extended upstream on the St. Croix beyond respondent's plant at an ordinary elevation of 675 feet. Thus the water level maintained by the Government in the St. Croix was approximately three feet above its ordinary high-water level at claimant's property. By thus raising the level at which tail waters must flow off from claimant's plant, the Government reduced the operating head by three feet, using ordinary high water as the standard, and diminished the plant's capacity to produce electric energy. The Company was obliged to supplement its production by purchase from other sources.

Loss of power was made the only basis of the award. The Court of Claims found as a fact that "The value of the loss in power as a result of the raising of the level of the St. Croix River by three feet above ordinary high water was \$25,000 at the time and place of taking," and it rendered judgment for that amount. There is no finding that any fast lands were flooded or that other injury was done to property or that claimant otherwise was deprived of any use of its property. It is true that the water level was above high-water mark on the St. Croix River banks and on claimant's structures, but damage to land as land or to structures as such is not shown to be more than nominal and accounts for no part of the award. The court held that the Government "had a right to raise the level of the river to ordinary high-water mark with impunity, but it is liable for the taking or deprivation of such property rights as may have resulted from raising the level beyond that point." Turning, then, to ascertain what property right had been "taken", the Court referred to *United States v. Cress*, 243 U. S. 316, 329, 330, which it said was identical

in facts, and held it had no option but to follow it and that "It results that plaintiff is entitled to recover the value of the decrease in the head of its dam."¹

The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but those only which result from a taking of property. If damages from any other cause are to be absorbed by the public, they must be assumed by act of Congress and may not be awarded by the courts merely by implication from the constitutional provision. The court below thought that decrease of head under the circumstances was a "taking" of such a "property right," and that is the contention of the claimant here.

It is clear, of course, that a head of water has value and that the Company has an economic interest in keeping the St. Croix at the lower level. But not all economic interests are "property rights"; only those economic advantages are "rights" which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. The law long has recognized that the right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters. But that a closed catalogue of abstract and absolute "property rights" in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption. We cannot start the process of decision by calling such a claim as we have here a "property right"; whether it is a property right is really the question to be answered. Such economic uses are rights only when they are legally protected interests. Whether they are such interests may depend on the claimant's rights in the land to which he claims the water rights to be appurtenant or incidental; on the navigable or non-navigable nature of the waters from which he advantages; on the substance of the enjoyment thereof for which he claims legal protection; on the legal relations of the adversary claimed to be under a duty to observe or compensate his interests; and on whether the conflict is with another private riparian interest or with a public interest in navigation.

¹ 101 Ct. Cls. 202, certiorari granted, 323 U. S. —.

The claimant's assertion that its interest in a power head amounts to a "property right" is made under circumstances not present in any case before considered by this Court.

Claimant is the owner of lands riparian to the St. Croix River, and under the law of Wisconsin, in which the lands lie, the shore owner also has title to the bed of the stream. *Kaukauna Co. v. Green Bay Canal Co.*, 142 U. S. 254, 271; *Jones v. Pettibone*, 2 Wis. 308; *Willow River Club v. Wade*, 100 Wis. 86. The case seems to have been tried on the theory that the Company may also claim because of interference with its rights as a riparian owner on the Willow. But the Government has not interfered with any natural flow of the Willow past claimant's lands. Where it was riparian owner along Willow's natural channel claimant already had created an artificial level much above the Government level. If claimant's land along the Willow was at all affected it was at the point where the land was riparian to the artificial channel, just back of the shore line of the St. Croix, where the land had been cut away to install the dam and power plant and to utilize the advantages of being riparian to the St. Croix. We think the claimant's maximum and only interest in the level of the St. Croix arises from its riparian position thereon and is not helped by the fact that its utilization of riparian lands on the St. Croix involves conducting over them at artificial levels waters from the Willow.

The property right asserted to be appurtenant to claimant's land is that described in *United States v. Cress*, 243 U. S. 316, 330, as "the right to have the water flow away from the mill dam unobstructed, except as in the course of nature" and held in that case to be an "inseparable part" of the land. The argument here is put that the waters of the St. Croix were backed up into claimant's tail race, causing damage. But if a dyke kept the waters of the St. Croix out of the tail race entirely it would not help. The water falling from the Willow must go somewhere, and the head may be preserved only by having the St. Croix channel serve as a run-off for the tail waters. The run-off of claimant's water may be said to be obstructed by the presence of an increased level of Government-impounded water at the end of claimant's discharge pipes. The resulting damage may be passed on to the Government only if the riparian owner's interest in "having the water flow away" unobstructed above the high-water line is a legally protected one.

The basic doctrine of riparian rights in flowing streams prevails with minor variations in thirty-one states of the Union.² It chiefly was evolved to settle conflicts between parties, both of whom were riparian owners. Equality of right between such claimants was the essence of the resulting water law. "The fundamental principle of this system is that each riparian proprietor has an equal right to make a reasonable use of the waters of the stream, subject to the equal right of the other riparian proprietors likewise to make a reasonable use."³ With this basic principle as a bench mark, particular rights to use flowing water on riparian lands for domestic purposes and for power were defined, each right in every riparian owner subject to the same right in others above and to a corresponding duty to those below.

The doctrine of riparian rights attained its maximum authority on non-navigable streams. No overriding public interest chilled the contest between owners to get the utmost in benefits from flowing streams. Physical conditions usually favored practical utilization of theoretical rights. In general non-navigable streams were small, shifted their courses easily and were not stable enough to serve as property lines as larger streams often do. They were shallow, could be forded and were no great obstacle to tillage or pasturage on two sides of the stream as a single operation. Such streams, like the lands, were fenced in, and while the waters might show resentment by carrying away a few spans of fence in the spring, the riparian owner's rights in such streams were acknowledged by the custom of the countryside as well as recognized by the law. In such surroundings and as between such

² The other 17 have some form of the appropriative system. It is based on the principle of priority or seniority, under which rights accrue to users in the order in which they first put waters to beneficial use. The principle is not equal right of use but paramount right in the earlier user. The use is not limited to riparian tracts but may be diverted to sites remote from the stream, thus spreading the benefits beyond riparian lands, a considerable advantage to some arid regions. The beneficial use is more extensive and includes use for irrigation, mining, manufacturing as well as domestic uses, and the water may be permanently diverted and the stream thereby diminished to an extent not allowable under the riparian rights theory. See Bannister, *Interstate Rights in Interstate Streams in the Arid West* (1923) 35 Harv. L. Rev. 960.

³ Bannister, *supra*, at 960. Choice of the arid sections of the country of the appropriative in preference to the riparian system is cited in Cardozo, *Growth of the Law*, 118, 119-20 as an example of "conscious departure from a known rule, and the deliberate adoption of a new one, in obedience to the promptings of a social need so obvious and so insistent as to overrun the ancient channel and cut a new one for itself."

owners equality of benefits from flowing waters was sought in the rule that each was entitled to their natural flow, subject only to a reasonable riparian use which must not substantially diminish their quantity or impair their quality. It was in such a stream that this Court found *Cress* as a landowner under the law of Kentucky possessed "the right to have the water flow away from the mill dam unobstructed, except as in the course of nature." 243 U. S. 316, 330.

Cress owned riparian lands and the bed as well of a non-navigable creek in Kentucky. He built a dam which pooled the water and diverted it to his headrace; after it turned the wheel of his mill, it was returned to the stream by his tail race. The Government built a dam in the navigable Kentucky River which backed up the water in this non-navigable tributary to a point one foot below the crest of the mill dam, leaving an unworkable head. The Court concluded that *Cress* was entitled to compensation as for a taking. It found that *Cress* had the right as a riparian owner to the natural flow-off of the water in this non-navigable stream. The *Cress* case is significant in that it measured the rights of a riparian owner against the Government in improving navigation by the standard which had been evolved to measure the rights of riparian owners against each other. The rights of the Government at that location were held to be no greater than those of a riparian owner, and therefore, of course, not paramount to the rights of *Cress*.

We are of opinion that the *Cress* case does not govern this one and that there is no warrant for applying it, as the claimant asks, or for overruling it, as the Government intimates would be desirable. The Government there was charged with the consequences of changing the level of a non-navigable stream; here it is sought to be charged with the same consequences from changing the level in a navigable one. In the former case the navigation interest was held not to be a dominant one at the property damaged; here dominance of the navigation interest at the St. Croix is clear. And the claimant in this case cannot stand in the *Cress* shoes unless it can establish the same right to have the navigable St. Croix flow tail waters away at natural levels that *Cress* had to have the non-navigable stream run off his tail waters at natural levels. This could only be done by an extension of the doctrine of the *Cress* case. As we have already said, it "must be confined to the facts

there disclosed." *United States v. Chicago, M. St. P. & Pac. R. Co.*, 312 U. S. 592, 597.

On navigable streams a different right intervenes. While riparian owners on navigable streams usually were held to have the same rights to be free from interferences of other riparian owners as on non-navigable streams, it was recognized from the beginning that all riparian interests were subject to a dominant public interest in navigation. The consequences of the latter upon the former have been the subject of frequent litigation.

Without detailing the long struggle between such conflicting interests on navigable streams, it may be pointed out that by 1909 the lines had become sharply drawn and were then summarized by a leading author:⁴ "The older authorities hold that such an owner has no private rights in the stream or body of water which are appurtenant to his land, and, in short, no rights beyond that of any other member of the public, and that the only difference is that he is more conveniently situated to enjoy the privileges which all the public have in common, and that he has access to the waters over his own land, which the public do not." "Access to and use of the stream by the riparian owner is regarded merely as permissive on the part of the public and liable to be cut off absolutely if the public sees fit to do so." And he quoted another writer of standing:⁵ "The owner of the bank has no *just privatum*, or special usufructuary interest, in the water. He does not, from the mere circumstance that he is the owner of the bank, acquire any special or particular interest in the stream, over any other member of the public, except that, by his proximity thereto, he enjoys greater conveniences than the public generally. To him, riparian ownership brings no greater rights than those incident to all the public, except that he can approach the waters more readily, and over lands which the general public have no right to use for that purpose. But this is a mere convenience, arising from his ownership of the lands adjacent to the ordinary high water mark, and does not prevent the State from depriving him entirely of this convenience, by itself making erections upon the shore, or authorizing the use of the shore by others, in such a way as to deprive him of this convenience altogether, and the injury resulting to him therefrom, although greater than that sustained by the rest of the public, is *damnum*

⁴ 1 Lewis on Eminent Domain (3d ed. 1909) 116, 119.

⁵ Wood on Nuisances (1st ed.) 592.

absque injuria." On the other hand, the author pointed out, there were cases holding that the riparian owners on navigable streams "have valuable rights appurtenant to their estates, of which they cannot be deprived without compensation." He considered this the better rule, and suggested that the courts indicated some tendency to adopt it.

However, in 1913 this Court decided *United States v. Chandler-Dunbar Co.*, 229 U. S. 53. It involved the claim that water power inherent in a navigable stream due to its fall in passing riparian lands belongs to the shore owner as an appurtenant to his lands. The Court set aside questions as to the right of riparian owners on non-navigable streams and all questions as to the rights of riparian owners on either navigable or non-navigable streams as between each other. And it laid aside as irrelevant whether the shore owner did or did not have a technical title to the bed of the river which would pass with it "as a shadow follows a substance." It declared that "In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." 229 U. S. at 62, 69. This Court then took a view quite in line with the trend of former decisions there reviewed, that a strategic position for the development of power does not give rise to right to maintain it as against interference by the United States in aid of navigation. We have adhered to that position. *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 424. The *Chandler-Dunbar* case held that the shore owner had no appurtenant property right in two natural levels of water in front of its lands or to the use of the natural difference between as a head for power production. In this case the claimant asserts a similar right to one natural level in front of his lands and a right of ownership in the difference between that and the artificial level of the impounded water of the Willow River. It constituted a privilege or a convenience, enjoyed for many years, permissible so long as compatible with navigation interests, but it is not an interest protected by law when it becomes inconsistent with plans authorized by Congress for improvement of navigation.

It is conceded that the riparian owner has no right as against improvements of navigation to maintenance of a level below high-water mark, but it is claimed that there is a riparian right to use

the stream for run-off of water at this level. High water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a taking for which compensation must be paid. But the award here does not purport to compensate a flooding of fast lands or impairment of their value. Lands below that level are subject always to a dominant servitude in the interests of navigation and its exercise calls for no compensation. *United States v. Chicago, M., St. P. & Pac. R. Co.*, 312 U. S. 592; *Willink v. United States*, 240 U. S. 572. The damage here is that the water claimant continues to bring onto its lands through an artificial canal from the Willow River has to leave its lands at an elevation of 675 instead of an elevation of 672 feet. No case is cited and we find none which holds a riparian owner on navigable waters to have such a legal right. The *Cress* case which the Court of Claims relied upon does not so hold and does not govern here.

Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.

Operations of the Government in aid of navigation oftentimes inflict serious damage or inconvenience or interfere with advantages formerly enjoyed by riparian owners, but damage alone gives courts no power to require compensation where there is not an actual taking of property. Cf. *Gibson v. United States*, 166 U. S. 269; *Scranton v. Wheeler*, 179 U. S. 141; *Bedford v. United States*, 192 U. S. 217; *Jackson v. United States*, 230 U. S. 1; *Hughes v. United States*, 230 U. S. 24; *Cubbins v. Mississippi River Commission*, 241 U. S. 351. Such losses may be compensated by legislative authority, not by force of the Constitution alone.

The uncompensated damages sustained by this riparian owner on a public waterway are not different from those often suffered without indemnification by owners abutting on public highways by land. It has been held in nearly every state in the Union that

"there can be no recovery for damages to abutting property resulting from a mere change of grade in the street in front of it, there being no physical injury to the property itself, and the change being authorized by law."⁶ This appears to be the law of Wisconsin. *Smith v. Eau Claire*, 78 Wis. 457; *Walsh v. Milwaukee*, 95 Wis. 16; *McCullough v. Campbellsport*, 123 Wis. 334; cf. *Smith v. Washington*, 20 How. 135; *Transportation Co. v. Chicago*, 99 U. S. 635. It would be strange if the State of Wisconsin is free to raise an adjacent land highway without compensation but the United States may not exercise an analogous power to raise a highway by water without making compensation where neither takes claimant's lands, but each cuts off access to and use of a natural level.

We hold that claimant's interest or advantage in the high-water level of the St. Croix River as a run-off for tail waters to maintain its power head is not a right protected by law and that the award below based exclusively on the loss in value thereof must be reversed.

Mr. Justice REED concurs in the result on the ground that the United States has not taken property of the respondent.

⁶ 1 Lewis on Eminent Domain (3d ed. 1909) 210.

SUPREME COURT OF THE UNITED STATES.

No. 312.—OCTOBER TERM, 1944.

The United States, Petitioner, }
vs. } On Writ of Certiorari to the
Willow River Power Company. } Court of Claims.

[March 26, 1945.]

Mr. Justice ROBERTS.

I think the judgment of the Court of Claims should be affirmed. The findings of fact by that court are supported by the evidence. They are to the following effect.

The St. Croix River is navigable. The Willow River is a non-navigable stream emptying into the St. Croix at Hudson, Wisconsin. The respondent has constructed several dams in the Willow River for the purpose of generating power. The one farthest down stream is "located near the confluence of the Willow River and the St. Croix River in the city of Hudson, Wisconsin, on land owned by [respondent] above ordinary high water of the St. Croix River." At the time of the erection of the respondent's dam, ordinary high water in the St. Croix at Hudson was 672 feet above sea level. The respondent's dam raised the water level in Willow River to a height of 694.5 feet above sea level, thus affording a power head of 22.5 feet.¹

By the Government's erection of Red Wing Dam the water level in the St. Croix at Hudson was raised to 675.3 feet above mean sea level. The backing up of the water reduced the power head of respondent's dam by approximately three feet, and diminished its supply of power accordingly.

In the court below the United States denied that the Red Wing Dam had raised the level of the St. Croix at Hudson to the ex-

¹ The court's opinion refers to the circumstance that the dam in question is not built across the natural channel of Willow River. Neither the court below nor the Government rely on this phase of the case, and I take it that decision does not depend upon it. The facts are that the St. Croix runs substantially from north to south. Willow River, which runs westward, formerly turned southward a short distance from the St. Croix and substantially paralleled the latter before emptying into it. The respondent dammed the natural channel to form a pool just east of the St. Croix, and then built its power house, dam and spillway at a point at the edge of the pool nearest the St. Croix.

tent claimed by the respondent, and contended that Willow River was a navigable stream and the respondent's dam was, therefore, an obstruction in the navigable waters of the United States for interference with or injury to which the United States was not responsible. These contentions were overruled and are now abandoned. There was no claim by the Government that any portion of the respondent's construction was below ordinary high water mark in the St. Croix. In fact the Government's answer admitted averments of the petition that the dam and power plant were located near a point where the Willow River discharges into the St. Croix River, and upon the respondent's property described in the petition. The answer further alleged that the "dam so constructed by the plaintiff near the point where the Willow River discharges into the St. Croix River . . . was constructed upon a concrete foundation extending across or occupying the full width of the mouth of a navigable stream" (meaning the Willow River, which the Government then claimed was navigable). The opinion of the court below states that respondent's tail race emptied into the St. Croix River below ordinary high water level, and this seems to be true. But the fact is irrelevant.

The respondent owned the land on either side of the Willow River at and above the point where its dam was constructed. Under the law of Wisconsin the respondent owned the bed of Willow River, and both by common and statute law of Wisconsin it had the right to erect and use the dam.² That right was property; and such a right recognized as private property by the law of a state is one which under the Constitution the federal government is bound to recognize. *Monongahela Nav. Co. v. United States*, 148 U. S. 312; *Fox River Paper Co. v. Railroad Commission of Wisconsin*, 274 U. S. 651, 654, 655. Compare *Ford & Son v. Little Falls Fibre Co.*, 280 U. S. 369, 375, 377.

Unless *United States v. Cress*, 243 U. S. 316, is to be disregarded or overruled, the respondent is entitled to recover for the property taken by the reduction of the efficiency of its dam due to the

² Revised Statutes Wisconsin 1858, Chap. XLI, §§ 2, 3; Chap. LVI, § 1; Wisconsin Stat. 1943, §§ 30.01(2)(3)c, 31.07; Wisconsin Laws, Private & Local, 1866, Ch. 122; 1872, Ch. 115; *Mabie v. Mattison*, 17 Wis. 1; *A. C. Conn Co. v. Little Sunnico Lbr. Mfg. Co.*, 74 Wis. 652; *Kaukauna Water P. Co. v. Green Bay & M. Canal Co.*, 75 Wis. 385, 390-391; *In re Water Power Cases*, 148 Wis. 124; *McDonald v. Apple River Power Co.*, 164 Wis. 450; *Apfelbacher v. State*, 167 Wis. 233.

raising of the high water mark. If the respondent's power dam had been in Willow River at a distance of one hundred yards or more above the confluence of the two streams, there can be no question that the decision in the *Cress* case would require payment for the injury done to its water power. Since under local law the owner of the land and the dam was entitled to have the water of the non-navigable stream flow below his dam at the natural level of the Willow River, which is affected by the natural level of the St. Croix, the raising of that level by navigation works in the St. Croix invaded the respondent's rights. This is the basis of decision in the *Cress* case. The fact that the respondent's dam is close to the high water mark of the St. Croix River can not call for a different result.

The court concludes that the *Cress* case is inapplicable by ignoring the finding of the trial court that the increase in level of the St. Croix above high water mark has diminished the head of respondent's dam by three feet. But to reach its conclusion the court must also disregard the natural law of hydraulics that water seeks its own level. At the confluence of the two rivers at normal high water of the St. Croix, both the St. Croix and the Willow are at the same level. Any increase in the level of the St. Croix above high water mark must result in raising the natural level of the Willow to some extent. The court below has found that the increase in the level of the St. Croix operates to diminish the head at respondent's dam by the specified amount. The facts thus established are in all relevant respects precisely those on the basis of which this court sustained the recovery of damages in the *Cress* case.

If the fact is that respondent discharges the water from its power plant through a tail race extending below high water mark of the St. Croix, that fact is irrelevant to the problem presented. Respondent claims, and the court below has sustained, only the right to have the flow of the Willow maintained at its natural level. That level has been increased by raising the level of the St. Croix above its high water mark. The increase in the level of the St. Croix above high water mark has operated to raise the level below the respondent's dam to an extent which has damaged respondent by diminishing the power head. To that extent re-

spondent has suffered damage and is entitled to recover on principles announced in the *Cress* case.

United States v. Cress has stood for twenty-eight years as a declaration of the law applicable in circumstances precisely similar to those here disclosed. I think it is a right decision if the United States, under the Constitution, must pay for the destruction of a property right arising out of the lawful use of waters not regulable by the federal government because they are not navigable.

The CHIEF JUSTICE concurs in this opinion.